

# Back to the future: human rights protection beyond the rights approach

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*Changing perspectives on human rights*

# **Can human rights bring social justice?**

Twelve essays

*Edited by Doutje Lettinga & Lars van Troost*



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the cutbacks in the social policy and the economic crisis in Barcelona on 19 June 2011.  
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## Introduction

Many years ago the philosopher Friedrich Hayek wrote that it took him a decade to acknowledge that there is no such thing as social justice. It is just a mirage (Hayek 1978: 57). Nonetheless, almost forty years later social justice is one of the ‘buzz words’ in the human rights arena. This does not mean that by now it is a neatly defined, uncontested concept. Actually, social justice means different things even to people with relatively similar backgrounds, including the contributors to this essay volume. Nonetheless, often the term covers “the relative distribution of rights, opportunities and resources within a given society, and whether it deserves to be regarded as fair and just” (Cramme & Diamond 2009: 3). Generally, that’s how we have used the term in this volume of essays.

Human rights isn’t an uncontested concept either. Sometimes the concept refers to legal rights under national or international law, sometimes to moral rights. When human rights are seen as legal rights they have the authority of the law which then also reflects on the activists, organizations and movements claiming to protect and promote them. The human rights activists defend the law, a higher international law if necessary, not just their own moral or political preferences. (This, of course, does not mean that the content and scope of human rights as legal rights are completely fixed. It does mean, however, that there are agreed methods of interpretation to determine content and scope.)

If, on the other hand, human rights are conceptualized as moral rights, their content and scope become more flexible. The move towards or, as David Petrasek writes in his reflection on the other contributions to this volume, the move back to a moral understanding of human rights

seems to fit well with a simultaneous instrumentalization of human rights. For a long time the realization of human rights was not just the mission but also the vision (the desired end-state) for organizations like Amnesty International and Human Rights Watch. In other words, human rights were their goal, their instrument and their language, whether they focused on civil and political rights or on the realization of the full spectrum of human rights. Nowadays human rights are (again) more and more considered to be instruments for attaining other goals, such as dignity, equality, or social justice.

It were exactly these goals that came under pressure when in 2008 the world was hit by a financial crisis which was soon followed by an economic one. Unexpectedly, the world economy was full of bailouts and other government interventions followed by austerity measures and citizens’ protests against and resistance to such measures under the banners of justice, democracy and dignity. The Occupy movement, the Greek and Spanish *Indignados* – what did human rights have to offer to their resistance to austerity measures in times of economic stagnation? The Arab uprisings – what did human rights have to offer those calling for “bread, freedom, social justice, and dignity”, apart from defending the public space for peaceful protest and political dissent? A lot, according to some; almost nothing, according to others. Both the human rights movement and the social justice movement have been deeply divided about the value of human rights in the fight against economic injustice.

Issues of distributive justice, especially in times of austerity, and a growing or resurgent understanding of human rights as a moral or political concept and not merely or mainly a

legal one, also seem to have led some to call for rethinking the concept – or was it a strategy? – of political and economic impartiality of human rights and human rights organizations.

These interrelated issues led the Strategic Studies team at Amnesty International's Dutch section to invite academics and practitioners in the field of human rights and social justice to reflect on conceptual and strategic issues related to the link between these two agenda's. This collection of twelve essays does not aim to re-enact earlier debates about the differences and similarities of rights categories or generations of rights. Whether economic, social and cultural rights are really human rights is not the issue. That question has been answered long ago. What do human rights actually have to offer in the struggle for social justice? That's the issue we try to address in this volume. The views expressed in the contributions that follow are those of the authors and do not necessarily reflect positions of Amnesty International, its Dutch section or Strategic Studies.

Almost all authors in this volume agree that both pursuits are different but that there is conceptual and strategic overlap between them. At the most basic level, as Sara Burke argues, social justice and human rights activists both aspire to a better world based upon peace, justice and other moral values like equality. Both consider poverty, hunger and marginalization as an affront to human dignity and, when it is the result of unwillingness, negligence or discrimination on the part of the state, as a violation of human rights too. Both would agree that the state has a responsibility to provide social welfare, at least to the most marginalized and vulnerable in society, and to offer an adequate remedy when inequality impedes people's livelihood. For Dan Chong and many other contributors, therefore, social justice issues, such as access to food, adequate housing, and health care, are part of the canon of 'core' human rights.

However, sometimes even the most human rights-friendly government in the world will be unable to prevent hunger or homelessness. If it cannot be shown that deprivation is the result of the (in)action of the state, as Rolf Künemann of FIAN explains in his contribution, one cannot speak

of a human rights violation in the legal sense of the word. Consequently, for organizations like FIAN that use arguments that find support in human rights treaties, it can be difficult to cooperate with the social justice movement. The alternative, delegating human rights, might be a trap to avoid, because, according to Künemann, it leads to the trivialization of human rights and "plays in the hands of socially oppressive elites" who can shun away from their legal obligations if these become moral duties only.

Moreover, Samuel Moyn and Aryeh Neier contend that social justice often articulates a vision that goes beyond the obligations of states to protect the poor, with activists fighting for the equal or equitable distribution of resources and wealth. Human rights are not that ambitious in theory, offering a minimal floor of protection at best. Although there is divergence on Moyn's (and Neier's even more) minimalist interpretation, most contributors agree that human rights, even if understood more progressively, may not satisfy the more radical social justice activist.

## **The potential of human rights to deliver social justice**

Authors are more divergent on the question whether the law-based understanding of human rights is, or can be, effective to deliver social justice. This divergence is partly related to their different understandings of social justice, as discussed by David Petrusek.

Many argue that human rights advocacy can help improve the fate of the poor and marginalized. Ashfaq Khalfan and Iain Byrne, for example, argue that Amnesty International has indirectly helped advancing and promoting social justice by focusing its economic and social rights work on the most marginalized and disadvantaged groups. But, Khalfan and Byrne concede, in order 'to shift the needle', Amnesty must devote more attention to redistribution of resources – including through tax policies – to help realize the full enjoyment of human rights by all.

For them and other authors, the work of human rights organizations can and should become complementary to that of social justice groups. Dan Chong, for instance,

argues that “advocating for human rights can help overcome the narrow identity politics and selective outrage that often inflicts social movements” while “at the same time excluding methods of achieving social justice that fail to meet human rights standards [e.g. violent revolutions]”. Sara Burke too argues in favour of enhanced cooperation between the two groups, but warns that this requires a deeper shift of discourse as well as the creation of platforms for activists to speak for themselves.

But many authors also point at the limitations of human rights to pursue social justice, at least when conceived as purely legal instruments. Eduardo Catalán, Koldo Casla, Dan Chong, and others believe that, although some measure of social justice can be achieved, ultimately a legal rights approach to social justice is too limited for fighting deeper forms of economic inequality. Apart from the vagueness and indeterminacy of international law with regard to specific (economic) policy solutions, and the inherent shortcomings of court-based methods like litigation (expensive, technical, relatively narrow in scope), the legal rights approach is seen as falling short to address systemic government failings and structural factors underlying violations and abuse. According to Eduardo Catalán, who sees global capitalism as the main cause for today’s social rights degradation, a legal rights approach fails to grant any serious protection and has “in some cases [even] become instrumental to legitimizing and guaranteeing capitalist expansion”.

From here, authors reach different conclusions. In order to become effective in the social and economic realm, a first group of authors suggests that human rights advocates must (re-)enter the political arena. They cannot afford to provide only ideologically neutral, technocratic solutions to politically-charged problems but must take these head-on. Dan Chong, for instance, writes that “the only way forward for human rights is to engage directly in political, economic, and cultural debates”. Widney Brown too, writes, that human rights organizations or advocates “must address deeper structural causes of human rights violations by revising their notion of impartiality” and challenge economic systems and actors. Koldo Casla,

pleads for an explicitly ‘political’ approach to human rights, i.e. constructing human rights politically “as a set of guidelines for political action” and by “playing the game of politics”. For him and other authors, such political advocacy can improve upon some of the limitations to achieve social justice that are inherent in strictly legal approaches to human rights.

A second group of authors disagrees that human rights can be effective tools to reduce or eliminate inequality and oppose the politicization of human rights in this way. Jacob Mchangama’s research suggests that the introduction and judicialization of social rights do not have any positive effects on people’s long-term social development and can even have negative consequences. Like Aryeh Neier, he believes that social justice issues require a balancing of different interests and that subjecting human rights issues to such a balancing act is not the right way to go. Samuel Moyn situates the problem in human rights norms themselves, which are in his view “compatible with inequality, even radical inequality”, because they don’t place any limits on the accumulation of wealth.

Paradoxically, the latter three authors seem to agree with the first group that, ultimately, social justice requires political mobilization but they believe that political parties and other social movements, not human rights organizations, must fulfil this task. Human rights groups are seen as ill-suited to resolve the inevitable trade-offs and priorities involved in matters of economic and social policy, which ought to be part of the democratic political process. There is the risk of human rights inflation and trivialization if human rights law is stretched or delegitimized to circumvent the indeterminism of international human rights law in providing clear-cut policy directions. There is also the probability that human rights organizations which defend the rights of all, including of unpopular groups, will find it difficult to mobilize the required large constituencies. For Samuel Moyn, the human rights movement simply “has neither the tools nor really the desire to bring the egalitarian task to the globe or even specific nations” and may not be “fearful enough to provoke redistribution”.

## What role for human rights groups in the pursuit for social justice?

So what role is there for human rights organizations like Amnesty International? In their essay Douthett Lettinga and Lars van Troost suggest that there are four approaches: *Justice over rights; Justice through rights; Rights over justice; and Justice for rights.*

Those authors who reject the moralization and potential politicization of human rights to pursue social justice believe that human rights organizations must do their utmost to be (seen as) politically impartial in order to remain effective. One author concludes from there that these organizations must thus work on civil and political rights only, including the rights of peaceful assembly, freedom of speech and fair trials. Any suggestion that human rights organizations are involved in the political process of (re)distributing society's resources, as an ostensible means of protecting social and economic rights, will undermine their political neutrality, and thereby their credibility to criticize oppressive governments that fare well on economic development. Others too believe that human rights organizations can play an effective role without necessarily taking on social justice causes. By defending civil and political rights of activists, they can help securing the space to mobilize public support for social justice causes, which may ultimately crystallize into the necessary political power to build a (global) welfare state. But they believe that this line of work can be accompanied with limited work on economic and social rights, although this will be of limited use for more radical social justice agendas.

Still others believe that time is long overdue for human rights organizations and advocates to deepen their engagement with social justice. They suggest that organizations like Amnesty International must start analysing the economic and political structures underlying rights violations and addressing these with political solutions that are system-oriented. Although these authors differ in the extent to which they believe that such organizations must conduct advocacy regarding allocation of resources or take positions that are only weakly supported in international law, they seem to agree that human rights groups can and should engage in advocacy on social and economic policies. According to some, identifying from a human rights law point of view which policies are best suited to achieve social justice is possible, compatible with impartiality, and helpful if accompanied with an investment in the required expertise, use of new methods (including quantitative methods) and partnerships. Such work is seen as contributing to making human rights more effective and locally relevant, by providing real solutions to denials of rights that are grounded in the lived experience, needs and wishes of marginalized groups rather than simply dealing with violations of human rights law.

With this essay volume we hope to contribute to the thinking on the relationship between human rights and social justice, two agendas that seem to converge while at least the first one may also be changing itself in that convergence.

Douthett Lettinga and Lars van Troost

## Human rights and the age of inequality

*Given how difficult it is for the regimes and movements that have been established around human rights to protect basic values – including now economic and social rights – what are the prospects that they might also respond to widening inequality of income and wealth locally and globally?*

### Introduction

Start with a parable: Imagine that one man owned everything. Call him Croesus, after the king of ancient lore who, Herodotus says, was so “wonderfully rich” that he “thought himself the happiest of mortals”. Impossibly elevated above his fellow men and women though he is, however, this modern Croesus is also remarkably magnanimous. With his global realm, the modern Croesus outstrips the already fabulous wealth of his predecessor by a long shot. But he does not want everyone else to starve, and not only because he needs some of them for the upkeep of his global estate. Instead, Croesus insists on a floor of protection, so that everyone living under his benevolent but total ascendancy can escape utter destitution. Health, food, water, even paid vacations – Croesus funds them all.

In comparison to the world in which we live today, where few enjoy these benefits, Croesus offers a kind of utopia. It is the utopia foreseen in the Universal Declaration of Human Rights (1948)<sup>1</sup>, whose goal is to provide a list of the most basic entitlements that humans deserve thanks to being human itself. This utopia is one that, though little known in its own time, has become our own, with the rise in the last half century of the international human

rights movement – especially now that this movement has belatedly turned to mobilization for the economic and social rights that the Universal Declaration promised from the start.

We increasingly live in Croesus’s world. It now goes without saying that any enlightened regime respects basic civil liberties, though the struggle to provide them is compelling and unending. Croesus hates repression and not merely indigence. He would never consent to a police state; he views the atrocities of war and occupation with horror; he glows with outrage when the word ‘torture’ is mentioned; he agrees cruelty is the worst thing we can do. But he also considers it outrageous, even as the sole inhabitant of the top, to live in a world of socioeconomic destitution at the bottom. So-called ‘social rights’ matter deeply to him. Croesus’s generosity, then, is as unprecedented as his wealth is. How could anyone trivialize what Croesus has to offer?

Let me try. For the value of distributive equality – any ceiling on the wealth gap between rich and poor – is as absent from the Universal Declaration, as well as from the legal regimes and social movements that take it as their polestar, as it is far from Croesus’s mind. True, the founding document of human rights announced status equality: according to its first article, all human beings are born free and equal in dignity and rights. It may be true that, in a world devastated by the evils of racism and genocide, the assertion of bare status equality was itself a revolutionary act. Yet this same status equality implies nothing more. Nothing in the scheme of human rights rules out Croesus’s world, with its absolute overlordship, so long as it features that floor of protection.

<sup>1</sup> United Nations General Assembly (UNGA) (1948), Universal Declaration of Human Rights, 10 December, UNGA Res 217 A(III).

In itself, Croesus' willing provision of a floor of protection seems deeply flawed – immoral even – if it comes together with the most massive inequality ever seen. This is the point of the thought experiment: to remind us that human rights, even perfectly realized human rights, are compatible with inequality, even radical inequality. Staggeringly, we could live in a situation of absolute hierarchy like Croesus's world, with human rights norms as they have been canonically formulated perfectly respected. Our question is whether we should continue to idealize Croesus's world as we continue to make our world more like it every day.

### Human rights in the age of national welfare

Writing the history of human rights in relation to that of political economy would involve two big stages – with a possible missed opportunity in between. The first, clearly, was the heroic age of the national welfare states after World War II. At that time, human rights reflected a small part of a larger and universal welfarist consensus that united the otherwise bitter enemies of the new cold war in 1948 and for two decades after. Contrary to stereotype, the 'West' for a long moment agreed about the importance of socioeconomic rights. Indeed, it was in part out of their own experience of socioeconomic misery, and not only the threatening communist insistence on an absolute ceiling on inequality, that the capitalist nations signed on so enthusiastically to welfarism. Of course, America never got as far in answering the welfarist imperative as those European nations that chose Christian Democracy, social democracy, or (in the east) communist egalitarianism. But the reigning consensus even in the capitalist nations in that lost age went far beyond a basic floor of protection to include its own exacting ideal of a ceiling on inequality, which to a remarkable extent they succeeded (like the communist nations) in building to accompany their new floor of entitlements. Indeed, it is perhaps because human rights offered a modest first step rather than a grand final hope that they were broadly ignored or rejected in the 1940s as the ultimate formulation of the good life.

The assertion of human rights in the 1940s, in other words, is best understood as one version of the update to

the entitlements of citizenship on whose desirability and necessity almost everyone agreed after depression and war. Franklin Roosevelt issued his famous call for a "second Bill of Rights" that included socioeconomic protections in his State of the Union address the year before his death, but the most important three facts about that call have been almost entirely missed. One is that it marked a characteristically provincial America's late and ginger entry into an already foreordained North Atlantic consensus. A second is that in promising "freedom from want" and envisioning it "everywhere in the world", Roosevelt in fact understated the actually egalitarian aspirations that every version of welfarism proclaimed, which went far beyond a low bar against indigence so as to guarantee a more equal society than before (or since). His highest promise, in his speech, was not a floor of protection for the masses but the end of "special privileges for the few" – a ceiling on inequality. The last is that though Roosevelt certainly hoped it would span the globe, it was to be nationally rather than internationally organized – in stark contrast to the assumptions of both political economy and human rights as they have prevailed in our time.

The most interesting truth about human rights in the 1940s, indeed, is not that they were an optional and normally ignored synonym for a consensus welfarism but that they still portended a fully *national* project of reconstruction – just like all other reigning versions of welfarism. Everywhere in the world, and not least in Roosevelt's America itself, welfarism was both announced and achieved on a national basis. The minor exception of the International Labour Organization to one side, in the 1940s, neither socioeconomic rights nor a more ambitious welfarism were international projects, except insofar as modular nation-states experimenting with their own arrangements were supposed to answer to higher values of morality. Of course the Universal Declaration is international in source and form, but essentially as a template for nations – "a high standard of achievement for all peoples and nations", as its own preamble tells us.

This ought to be unsurprising. Welfarism had been national ever since the crisis between the world wars prompted

state-led reconstruction. If 'national socialism' did not triumph as a slogan or a programme after World War II, it was in part because the name was taken but mainly because a more ecumenical national welfarism – my label – structured a debate about how far (not whether) the state would intervene into economic affairs to plan and manage growth, with a range of options from tweaked capitalism to full-blown communism. Indeed, a once more internationalist socialism had been reduced to the scale of the nation. Having never ascended above it, 'welfarism in one country' was the rule where full-blown socialism did not obtain, like various places in Western and everywhere in Eastern Europe.

Political economy ascended beyond the nation in the 1940s only for the sake of avoiding catastrophe if individual states failed in their obligation of countercyclical management of their own economies, never for the sake of either a global floor of protection, let alone a global ceiling on inequality. As economist and Nobel laureate Gunnar Myrdal explained laconically, looking back at this consensus about the geographical limits but relative generosity of post-war distributive justice, "the welfare state is nationalistic" (Myrdal 1960). The original relation of the Universal Declaration to political economy was thus the lowest set of guarantees for which the national welfarist experiment should strive, when conducted in the modular boxes provided – and divided – by political borders.

The harmony of ideals between the campaign against abjection and the demand for equality succeeded only nationally, and in mostly North Atlantic states, and then only partially. Whatever success occurred on both fronts thus came with sharp limitations – and especially the geographical modesty that the human rights idiom has successfully transcended. It is, indeed, as if globalization of the norms of basic protection were a kind of reward for the relinquishment of the imperative of local equality.

Even the decolonization of the world, though unforeseen at the time of the Universal Declaration that accommodated itself to the empires of the day, hardly changed this relationship, since the new states themselves adopted the

national welfarist resolve. The burning question was what would happen after, especially in the face of the inability of the Global South to transplant national welfarism and the wealth gap that endures to this day between two sorts of countries: rich and poor.

## From national welfare to neoliberal globalization

There was, some hoped, the possibility of globalizing welfarism, so as to seek the floor of protection and ceiling on inequality globally that some nations achieved internally. The aforementioned Myrdal, for example, held out this possibility. But his aspirations, like those of the Global South's 'New International Economic Order' (NIEO) that followed, did not survive. (The neglected NIEO was a set of proposals from the Global South that focused on income and wealth inequality among nations rather than aversive economic and social rights protection for individuals.<sup>2</sup>) Instead what historian Mark Mazower has mordantly dubbed "the real new international economic order" of global market fundamentalism did. In the ultimate compromise vote, the Nobel prize for economics for 1974 was won together by Myrdal and his ideological opponent Friedrich Hayek – but where one of them was forgotten, the other saw his fondest wishes come true. In the 1970s, starting in the United Kingdom and the United States – and in the Latin American southern cone just before and in authoritarian form – states retrenched from social provision, and politicians were elected (or, in Latin America, took power) who set out to destroy the national welfarist consensus for which human rights had offered a modest and optional synonym three decades earlier.

Why the practical victory of that 'neoliberalism' occurred when and how it did is currently a topic of heated debate. After the 1970s, Croesus's world came closer and closer to being a reality, for his dreams became ours. To the extent that a utopia of justice survived, it was global but minimal,

2 See 'Towards a history of the New International Economic Order' (2015), special issue of *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 6(1).



allowing for the worst state abuses to be decried, while in the socioeconomic domain it pictured a floor of protection without a ceiling on inequality.

Whatever its potential in theory, the human rights regime and movement adapted in practice to the new ambience. For one thing, the idea of human rights in its heroic age followed the transformation of political economy in its scalar leap beyond the nation and towards the globe. Further, it prioritized not the agency of states to launch and manage national welfare but the rights of individuals to be free from harm and to enjoy a rudimentary government that at best averted disaster and abjection, especially in the socioeconomic realm, where a measure of social equality was simultaneously forsaken by faltering welfare states as an ideal. The basis in national and frequently ethnic solidarity that had allowed for higher levels of redistribution within national settings had admittedly come along with built-in exclusions. But in exchange for its inclusion and even cosmopolitanism, the rise of human rights abandoned any egalitarian pressure in theory and practice.

Consider the parallels between market fundamentalism and international human rights, to see if they go beyond their bare simultaneity. Both have some relationship to earlier liberalism that they intentionally revived in the face of twentieth century threats, both totalitarian and merely socialistic. Both contemplated an individualistic and globalizing remedy to what they regarded as the pathologies of a national welfarism too committed to the values of collectivity and sovereignty, and not least when it came to the postcolonial developmentalist state. Both fell on deaf ears in the 1940s – with the refugees of economic liberalism seeking asylum in the altitudes of Mont Pèlerin to ride out the storm of national welfarist victory, and a tiny band of international lawyers interested in activating the role of human rights across borders postponing their plans to a later era. Then both, in a remarkable and unexpected reversal of fortune, experienced a moment of breakthrough in the mid-1970s: Milton Friedman – Hayek's successor as worldwide champion of free markets and small government – was given the Nobel prize for economics in 1976, while Amnesty International won the Nobel prize for peace in

1977. Both, finally, have defined the decades since in their respective domains of international economics and international ethics.

In spite of the obvious objection that the Universal Declaration – like our generous Croesus – offers a floor of protection against the worst miseries of free markets, the apparently tight chronological relationship between the twinned rise of human rights and of 'neoliberalism' is so tantalizing that it has provoked a range of responses. Could the rise of human rights really have nothing to do with the rise of market fundamentalism – or at least the decline of national welfarism? This question drives the third stage of the history of human rights told in connection with political economy. The answer I would give – others are available – takes a middle way between those who claim that human rights escape scot-free from the charge that they abet market fundamentalism, and those Marxists who reply that they are nothing but an apology for it. Attention to this problem has generally remained stuck at the threshold: broad chronological and substantive parallels between human rights and market fundamentalism. Naomi Klein's folkloristic history of the 'shock doctrine' rightly dates the possible connection to the 1970s, but wrongly focuses on authoritarian violence as the most important thing to consider, in the laboratory that Augusto Pinochet's Chile provided to free market experiments, before Ronald Reagan and Margaret Thatcher even came to power.

In my view, the real trouble about human rights when historically correlated with market fundamentalism is not that they promote it but that they are unambitious in theory and ineffectual in practice in the face of its success.<sup>3</sup> Against more conspiratorial accounts that view human rights as a dastardly accomplice of shifts in global political economy, I would emphasize the simple failures of human rights regimes and movements in the socioeconomic domain. For there is this extraordinary difference that divides the otherwise companionable

3 For helpful guides to debates about the effects of economic and social rights protection, see Bjørnskov & Mchangama (2013) and Landau (2012).

pair of market fundamentalism and human rights: the one has massively transformed the world, whereas the other has been condemned merely to watch. In a vulgar formula, neoliberalism, not human rights, is to blame for neoliberalism. The real trouble is that those systems of law and programmes of action that have so far been established around socioeconomic rights have made of them neither an enabling tool, nor a threatening enemy, but a helpless bystander of market fundamentalism. At most, their tragedy is that they have occupied the global imagination among those committed to genuine reform, but have so far contributed little of note, merely nipping at the heels of a giant whose path goes unaltered and unresisted.

In the end, the biggest reason that human rights have been a powerless companion of market fundamentalism is that they simply have nothing to say about inequality, which we now know to be the central achievement, locally and globally, of the new political economy. The chief worry about the established idealism of our age is not that it destroys the very socioeconomic floors it wants to build, let alone abets “disaster capitalism” (in Klein’s phrase) whose primary form is repression or violence. In too many places, those floors never existed in the first place, and global capitalism is hardly the only or even the main source of state abuses. Indeed, there is no denying that after 1970s, mainly thanks to Chinese marketization, more humans were brought out of poverty – and thus above a basic threshold of socioeconomic protection – than by any prior force in history. Rather, the problem is the one Croesus’s example is supposed to illustrate: even were all the dreams of international human rights movements to be fulfilled, it is as much low ambitions as failures to realize them that made human rights companions of market fundamentalism.

In short, the chief connection between human rights and market fundamentalism is a missed connection: precisely because the human rights revolution that has focused so intently on state abuses and has at its most ambitious dedicated itself to establishing a normative and actual floor for protection in the socioeconomic domain, it has failed to respond to – or even allowed for recognizing –

neoliberalism’s obliteration of the ceiling on distributional inequality. Our world has come to resemble Croesus’s world more and more, since humanity has so far only found a way to embed the demand for a modicum of social equality in the form of a national welfarism now superannuated and irretrievable, while the human rights movement has neither the tools, nor really the desire, to bring the egalitarian task to the globe, or even specific nations.

### Another human rights movement?

Could a different form of human rights than the regimes and movements spawned so far correct this mistake? I doubt it. To be absolutely clear, this is not to contradict the moral significance and possibly even historical success of human rights when it comes to their core uses in combating political repression and restraining excessive violence. But when inequality has been contained in human affairs, it was never on the sort of individualistic, and often antistatist, basis that human rights do indeed share with their market fundamentalist *Doppelgänger*.

And when it comes to the necessary mobilizational complement to any programme, the chief tools of the human rights movements in its most renowned and possibly successful campaigns – the critique of state repression and the melioration of disasters of war – are simply not fit for use in the socioeconomic domain. It is in part because the human rights movement is not up to the challenge when it comes to each and every of its self-assigned tasks that it has been condemned to offer no meaningful alternative, and certainly no serious threat, to market fundamentalism. The success and prestige of human rights in our day – and the absence of other political approaches – has bred the mistake of the man who, lacking anything but a hammer, then treats everything like a nail. Croesus’s world is safe from the drastic mismatch between need and remedy as human rights regimes and movements so far can present it.

In Herodotus’s *Histories*, Solon’s shaming of Croesus merely took him down a peg. It was only Persian armies that toppled him. The truth is that global socioeconomic justice, like local socioeconomic justice, would require

redistribution under pressure from the rich to the poor, something naming and shaming is never likely to achieve, even when supplemented by novel forms of legal activism. Thinking historically, it can be no accident that the era of the moderation of inequality in the mid-twentieth century was also the age of both totalitarian regimes and a cold war that exacted an appalling toll on the world, including at the hands of the ultimate victor. At the zenith of national welfare, a floor of protection came linked to a ceiling on inequality, and both were built together, only in the presence of frightening internal and external threats – a workers' movement and a communist menace. In response to those dangers, change came thanks to a 'reformism of fear' – the working class was placated and untold violence was brought against enemies, often at home and always abroad.

Yet if the human rights movement at its most inspiring has stigmatized such repression and violence, it has never offered a functional replacement for the sense of fear that led to both protection and redistribution for those who were left alive by twentieth century horror. If a global welfarism is ever to be brought out the realm of the ideal where it is currently exiled, it will need to be championed not only as a programme but also by a movement. But it will not look like our human rights movement, which has become prominent as our world has become more like Croesus's world each day.

None of this is to say that human rights activism, to which Amnesty International made such an epoch-making and defining contribution in the last century, is irrelevant. The stigmatization of states and communities that fail to protect basic values is – so long as it is not selective and a smokescreen for great power politics – a tremendous contribution. But human rights advocates in their current guises do not know how to stigmatize inequality, and not principles but a new political economy would have to be invented to actually moderate it. Most of all, history suggests that they are the wrong kind of agent: not fearful enough to provoke redistribution. Could a new form of human rights mount such a challenge? Possibly, but it would need to be so different as to be unrecognizable, and threaten the power to stigmatize in the face of the violation of basic values that activists have carefully and with much hard work learned to achieve. If this is correct, human rights movements face a deeply strategic choice about whether to try to reinvent themselves – or whether to stand aside on the assumption that as inequality grows, someday its opponent will arise. Until then, Croesus's world is our common fate.

## How human rights can address socioeconomic inequality

*While human rights do not provide any magic bullet to solving social and economic injustices, the framework of human rights can channel social justice activism in ways that are beneficial to alleviating unnecessary suffering. Economic and social rights can guide efforts to reform international, state, and corporate actors in ways that remedy but do not necessarily end social inequality.*

### Introduction

By now, we should all be familiar with statistics describing the extent of global economic inequality. According to Oxfam International, the wealthiest 85 people on the planet own as much as the poorest 3.5 billion people, or 50 per cent of humanity (Hardoon 2015). By 2016, the richest 1 per cent of the world's population will likely own more than the other 99 per cent combined.

Some people actually applaud these facts. For example, multimillionaire Kevin O'Leary (2015), a panellist on the popular US television show *Shark Tank*, stated that "this is fantastic news... because it inspires everybody, gives them motivation to look up to the 1 per cent and say, 'I want to become one of those people'". However, many others believe that this is an absurd level of inequality that represents a profound injustice.

How does the global human rights movement respond to this sense of injustice? Do human rights laws and norms provide concrete guidance in dealing with socioeconomic inequalities? Do human rights NGOs have the tools and capabilities to contribute meaningfully to efforts to achieve social justice? I believe that they do. While human rights do not provide any magic bullet to solving social and economic injustices, the framework of human rights can

channel social justice activism in ways that are beneficial to alleviating unnecessary suffering.

### Defining terms

When considering the intersection between human rights and social justice, it is important at the outset to define our terms. Different people have somewhat different definitions and approaches in mind when they use the terms 'human rights' and 'social justice'. There is no monolithic set of ideas, institutions, or methods that encapsulates either the project of human rights or that of social justice. As evidenced by the debates in a recent essay volume of Strategic Studies (Lettinga & Van Troost 2014), 'human rights' can variously refer to the international laws and norms arising from the Universal Declaration of Human Rights, or the activities of national and international institutions designed to uphold those norms, or the myriad local struggles that communities around the world wage for their livelihoods. Although local efforts may not be explicitly connected to national and international laws and norms, it is clear that in some sense, 'human rights' refers to all of these things. There are diverse methods to advocating, enforcing, and achieving human rights, from international courts to national policy making to local cultural change, and everything in between. Despite the diversity in definitions and approaches, at its core, the idea of human rights represents the claim that all people, based on universally shared qualities, deserve a certain threshold of equitable treatment that upholds their human dignity.

Likewise, 'social justice' advocacy does not lend itself to a single approach. As global health advocate Paul Farmer (2005: 157) explains, "People who work for social justice, regardless of their own station in life, tend to see the world

as deeply flawed. They see the conditions of the poor not only as unacceptable but as the result of structural violence that is human-made.” Thus, social justice work involves addressing economic inequality and social marginalization as if they were – in some sense – human rights violations, rather than unfortunate or inevitable consequences of history. However, beyond that core definition, approaches to social justice can vary widely. At one end of the spectrum, liberals seek to achieve social justice by having marginalized groups gain access to the institutions (e.g., corporations, the military, government, etc.) that have excluded or discriminated against them. At the other end of the spectrum, radical or Marxist activists seek to remedy social inequalities by overturning or revolutionizing those very institutions that they deem unjust. As a result, social justice work could range from promoting female CEOs, to fighting against the very corporations that those CEOs may lead.

Given these broad definitions, there is clearly some overlap in goals and methods between human rights and social justice work, but there is also some divergence. At the most basic level, when poverty and social marginalization are the result of a discrete act of discrimination, it is clearly identifiable as a human rights violation. Today, human rights activists also tend to address many other instances of economic inequality through the language of economic and social rights. But we should remember that this was not always the case. I will discuss some of the divergences between human rights and social justice later, but first it is important to establish the compatibility of these two approaches through the framework of economic and social rights.

### **The legitimacy of economic and social rights**

The Universal Declaration of Human Rights in 1948 unambiguously spelled out a list of economic and social rights that included basic livelihood needs such as adequate food, housing, health care, and education. However, it took another half-century before human rights organizations in the West – who proclaimed themselves as global human rights advocates – actually began to fight for these rights (Chong 2010; Nelson & Dorsey 2008).

Some prominent figures in the field of human rights continue to question the legitimacy of economic and social rights. For example, a founding father of Western human rights activism, Aryeh Neier (2006) stated:

“From my standpoint, if one is to talk meaningfully of rights, one has to discuss what can be enforced through the judicial process. The concern I have about economic and social rights is when there are broad assertions which broadly speak of the right to shelter, education, social security, jobs, health care... then I think we get into territory that is unmanageable through the rights process or the judicial process... So I think it's dangerous to the idea of civil and political rights to allow this idea of economic and social rights to flourish.”

Under this formulation, human rights are primarily legal instruments, and because advocacy for food, health care, and education often requires non-judicial methods and positive governmental duties, these are not valid human rights. This has been the official position of the US government since at least 1948. Similarly, leaders like Kenneth Roth (2004a), director of Human Rights Watch, have argued that economic and social rights do not fit the ‘naming and shaming’ methodologies that human rights NGOs have long mastered. The implementation of economic and social rights requires the delicate balancing of government budgets, rather than absolute claims to non-negotiable rights. According to Roth, NGOs would be better off limiting their work to those cases in which inequality results from a concrete act of discrimination, rather than a systemic injustice. Due to objections like these, when NGOs such as Amnesty International began to work on a range of social justice issues through the framework of economic and social rights, the move was met with much controversy.

Are economic and social rights truly legitimate human rights, and are they appropriate instruments for NGO work? Recent experience has proven that the answer to both questions is yes, for two reasons.

First, there is nothing inherent about civil and political rights that makes their judicial enforcement uniquely effective in a way that is different from economic and social rights. As a recent Lettinga and Van Troost (2014) volume makes clear, the global human rights regime has suffered some setbacks in enforcing civil and political rights in recent years. Whether it is the failure of the R2P doctrine to result in a meaningful response to the Syrian civil war, or the questions about the ICC as a legitimate and effective global court, it is clear that global legal and political institutions are not especially reliable mechanisms to enforce civil and political rights. The so-called war on terrorism has also shown that Western societies have been willing to scrap even the most well-established rights, such as the prohibition against torture and illegal detention, when they perceive that their security is threatened. The lack of any effective judicial remedy for the most flagrant cases of rendition and torture by the United States – the self-proclaimed global leader in human rights – should demonstrate that even courts in liberal democracies provide no guarantee for the protection of civil and political rights.

Second, contrary to Neier's concerns above, campaigners for economic and social rights have been able to achieve a measure of social justice through the process of judicial enforcement in recent years. They have successfully litigated economic and social rights around the world, when national governments have been able to craft and interpret these rights as justiciable instruments (ESCR-Net 2015). National courts have even reviewed some notable cases that involve the positive duty of the state to redistribute scarce resources. For example, in the landmark *Grootboom* case,<sup>1</sup> a community of landless squatters without access to basic public services sued the South African government for violating their right to housing. The Constitutional Court of South Africa found in favour of the claimants, stating that the government must implement a reasonable policy to allocate housing resources toward the neediest

populations, with a view toward progressively achieving universal access to housing. Similarly, in the *Treatment Action Campaign* case,<sup>2</sup> the Constitutional Court of South Africa interpreted their right to health care as requiring that the government provide anti-retroviral drugs to all HIV-infected pregnant women, and to take reasonable measures to improve the public health system to prevent HIV transmission. This lawsuit, and the public pressure that built around it, led to a dramatic increase in the distribution of HIV-Aids medication in South Africa in the ensuing years, which has saved literally hundreds of thousands of lives (AVERT 2015).

So it is clear that food, housing, and health care can be valid human rights, even when human rights are conceived narrowly as legal instruments. When a state makes a commitment to embedding these rights in its constitution, and progressive courts are willing to review the reasonableness of government policies in upholding these rights, then economic and social rights are potentially just as enforceable through the judicial system as civil and political rights. Social justice issues that involve material livelihood and economic redistribution are part of the canon of 'core' human rights, despite what some prominent human rights activists have proclaimed (Neier 2013).

### The effectiveness of economic and social rights

However, the question remains: Are economic and social rights particularly effective mechanisms for fighting economic inequality and achieving broad-based social justice? Efforts to achieve the implementation of economic and social rights in legal and judicial arenas face some significant limitations (Chong 2010). First, international law on economic and social rights is underdeveloped. In particular, the language of Article 2.1 of the International Covenant on Economic, Social, and Cultural Rights, which requires states to "take steps... to the maximum of its available resources, with a view to achieving progressively

1 South African Constitutional Court (2000), *Government of the Republic of South Africa and Others v. Grootboom and Others*, Ruling of 4 October. Available at: <http://www.escr-net.org/docs/i/401409>.

2 South African Constitutional Court (2002), *Minister of Health v. Treatment Action Campaign*, Ruling of 5 July. Available at: <http://www.saflii.org/za/cases/ZACC/2002/16.pdf>.

the full realization” of these rights, opens itself to a wide range of interpretations.

At the national level, many states do not have as progressive a constitution as South Africa, and many national courts are unwilling to review social and economic policy (Piovesan 2002). This is particularly true in the United States, the world’s largest economy, which remains opposed to legal protections against poverty at both the national and international levels. The United States justifies its position based on libertarian notions of democratic capitalism, arguing that the best way to progressively realize an end to poverty is for the government to shift responsibility for social welfare onto private actors. Under this laissez-faire economic ideology, any attempt by government to enforce legal rights to food, housing, and health care calls up the dreaded labels of socialism and tyranny. Inequality is therefore a natural and benign consequence of capitalist economic growth, as Mr. O’Leary claimed above.

Given the vagueness of international law and the ideological controversies surrounding economic policy, it can be difficult to come to a consensus on what constitutes a violation of economic and social rights. Policy makers can make the seemingly reasonable – even if inaccurate – claim that signing free trade agreements, passing tax cuts for the wealthy, and eliminating labour and environmental regulations will lead to economic growth, thereby eliminating poverty and achieving social justice. Holding such a government legally accountable for social justice obligations is a major challenge.

Another limitation in judicial approaches to economic and social rights is the fact that litigation is typically an expensive and relatively inaccessible form of social activism. Defending legal rights requires a level of legal expertise that the vast majority of poor and marginalized people cannot easily obtain. Even when cases are litigated successfully, as in the examples from South Africa, court rulings can be limited in scope to a particular population in unique circumstances, and can be difficult to enforce upon intransigent governments.

Therefore, it is not sufficient merely to demonstrate that social justice concerns are legitimate targets of human

rights activism. The human rights community must continue to develop effective methods for advancing these concerns, and a purely legalistic approach to social justice is inherently limited.

But economic and social rights are not unique in this respect. Many of these same challenges – inaccessible legal processes, ideological resistance, and ineffective institutions – are also found in approaches to civil and political rights. From torture in the United States, to war crimes in Syria, to female circumcision in Egypt, the law has not adequately protected some of the most basic civil and political rights. The major international human rights organizations, predominantly staffed by legal experts, have often hoped that the technical language of the law and the routinized processes of judicial systems would allow them to advance human rights in a non-ideological and politically neutral manner. However, human rights have always been politically controversial, and an orientation toward a narrow set of legally enforceable civil and political rights has never fully protected human rights NGOs from criticisms of partiality or bias. When NGOs identify violations by their own governments, they are accused of political partisanship; when they criticize the practices of other states, they are accused of foreign interference and Western bias. As long as human rights organizations consistently apply international standards, an embrace of social justice issues should not substantially change this calculus. Whether it is social justice or criminal justice, the only way forward for human rights is to engage directly in political, economic, and cultural debates.

### **What human rights bring to social justice work**

Social and political activism, from demonstrating outside a World Bank meeting, to boycotting a fast food restaurant, to organizing a social media campaign for a living wage, is the bread and butter of social justice work. Social justice organizations, from the global to the local, are renowned for addressing the systemic causes of social inequality and confronting directly the institutions and ideologies that perpetuate this inequality. The opportunity for synergy between human rights and social justice work is significant

here. When defined sufficiently broadly, both human rights and social justice advocacy involve empowering disenfranchised people to achieve an adequate livelihood, a sense of personal dignity, and a level of social equality.

Human rights organizations such as Amnesty International can continue to partner with and support myriad social justice organizations around the world that are working to uphold human dignity. Many of the methods they employ will be the same ones they have used for decades to defend civil and political rights – documenting and publicizing abuses, comparing state practices to international laws and norms, and using mechanisms at the national, regional, and global levels to change behaviour. Some NGO methods may need to be adapted to social justice concerns, as when human rights organizations target shaming campaigns and shareholder actions directly at corporations rather than states. Some new methods may need to be employed, such as creating quantitative indicators to measure performance, or expanding tools for analysing national budgets, or developing enforceable international standards for corporate accountability (Corkery 2012). But as Saiz and Ely Yamin (2013) argue, methods of advocacy should adapt to meet an organization's mission, and not vice versa.

This kind of advocacy often involves legal and judicial methods, but “the most durable and transformative change comes about when judicial challenges and policy advocacy aimed at decision-making elites has been part of a broader strategy enabling social justice movements to deploy the tools of human rights advocacy in ways adapted to their particular context” (Saiz & Ely Yamin 2013). This pairing of legal strategies and mass mobilization is what made the *Treatment Action Campaign* in South Africa so successful a decade ago (Young 2012: 251).

In doing so, human rights organizations do not have any kind of magic formula that would make social justice work more effective. However, I do believe that the human rights movement can channel social justice work in useful ways, to ensure maximum convergence between the two approaches. As I mentioned above, while there is significant overlap in how human rights and social justice groups work

for dignity and equality, there is also some divergence. Social justice activism can involve a wide range of methods and ideological commitments, from lobbying for equal pay in the workplace, to fomenting a violent revolution. Not all of these methods and commitments are consistent with human rights. A human rights framework therefore has the potential to unify diverse movements around a single theme, while at the same time excluding methods of achieving social justice that fail to meet human rights standards.

One of the defining characteristics of the human rights framework is its inherent universalism. Human rights applies to all humans equally, regardless of membership in any gender, ethnic, religious, or economic group. In this way, advocating for human rights can help overcome the narrow identity politics and selective outrage that often inflicts social movements. Social justice work is often identity-specific: Christians are concerned about the persecution of Christians, workers fight against the outsourcing of their own jobs to foreign countries, and racial minorities struggle against discrimination and prejudice. Group identity can be a strong motivator to mobilize social justice activists, but it is also inherently limited insofar as it excludes other like-minded allies. Indeed, group identity has often become the basis by which self-proclaimed social justice movements violate the rights of others in pursuing their goals. One group that has endured discrimination ends up attacking or competing against another group that has experienced its own share of discrimination.

In response, the human rights framework argues in favour of social justice for people *qua* humans, which can build the politics of solidarity rather than identity. This universalism is what has helped make human rights the “lingua franca of global moral thought”, imbuing it with a sense of global legitimacy (Ignatieff 2001: 53). Rather than resorting to identity politics, the human rights framework identifies areas of principled overlap between the claims of various marginalized groups. It holds the potential to create alliances within social movements, whose success often depends upon mass mobilization. The added value of



human rights to social justice movements is not only in the new tools and mechanisms that activists might access, but in the unifying framework that adds voices, numbers, and leverage to the movement.

The human rights framework also requires that actions to remedy injustice are consistent with respecting the rights of others. Many so-called social justice movements in history have resulted in bloody civil wars, violent revolutions, or oppression by the formerly oppressed (Neier 2013). In these cases, efforts to achieve social justice can clearly diverge from human rights. Human rights do not call for the radical equality of social and economic outcomes that must be achieved through violent revolution and imposed by an authoritarian government. Instead, human rights arise from a “morality of the depths”, requiring states to ensure that all people receive at least minimally adequate treatment that respects their basic dignity (Shue 1996). Human rights do not advocate for an end to all economic inequality, but for an adequate remedy when inequality impedes the livelihood of the poorest and most marginalized. This minimalist focus on state institutions following the rule of law makes human rights activists tend to support non-violent reformist solutions rather than violent revolutionary ones. The reformist ethos of human rights may not satisfy more radical social justice activists, but moderate activists should embrace this approach. History has shown that violent revolutions in the name of social equality have often failed to achieve either peace or justice, whereas non-violent movements have been found to accomplish their goals more effectively (Chenoweth & Stephan 2012). Reformist approaches also have a better chance of attracting public support in ideologically conservative nations like the United States, where more radical approaches to social justice are considered anti-democratic.

Thus, in its universalist and minimalist incarnation, human rights proclaim that states have legal and moral obligations to implement reasonable policies that would create solutions to extreme forms of economic and social inequality. When applied to social justice work, economic and social rights define poverty and marginalization as human-made institutional failures that require a remedy, rather than accidents of history or unfortunate circumstances.

## Limitations and ways forward

Due to the reformist nature of the current human rights framework, it should also be clear what it cannot accomplish for social justice activists. Although it demands remedies for radical inequalities, it cannot justify a Marxist revolution or a state that seeks to achieve an equality of economic outcomes through oppressive means. Although it can condemn certain state practices, it cannot prescribe a single appropriate set of political institutions and economic policies. Although it can remain impartial with respect to any government affiliation or political party, it cannot provide ideologically neutral, technocratic solutions to politically-charged problems. And although it can provide remedies for the worst effects of neoliberal globalization, it has not yet created enforceable standards that would regulate the global marketplace or reverse the spread of corporate power.

Given these limitations, the international norms of human rights still provide some minimal policy guidelines for states and other actors to achieve social justice. This would involve, first, doing no harm. States, international organizations, and corporate actors must implement development policies that do not discriminate against disenfranchised groups, displace local communities, or deny people a right to a basic livelihood. Second, when economic policies create trade-offs or result in loss and displacement, poor communities must receive adequate compensation. States must administer at least a minimally adequate and progressively improving social safety net for people who cannot fend for themselves. This includes basic income, nutrition, shelter, access to health care, and other public goods that are required for maintaining personal dignity. As such, the human rights framework explicitly rejects libertarian arguments for trickle-down economics that absolve the government from responsibility for social welfare. Third, human rights assume that states' social justice obligations do not end at their national borders. International cooperation and assistance is required to achieve social and economic justice, whether it be in the form of humanitarian aid, preferential trade policies, support for migrants, or help with conflict prevention.

These obligations are obviously difficult to enforce through national judiciaries and international institutions, but that is not the main goal. A major advantage in connecting human rights and social justice work is in the political advocacy and cultural change that can result from the overlap between these two movements. This advocacy can improve upon some of the limitations that are inherent in judicial approaches to human rights. When judicial remedies are not available or accessible to marginalized communities, human rights and social justice activists can build social movements that pressure governments to enact effective policies, and pressure courts to reinterpret the law (Balkin 2005). Social movements in many countries have achieved widespread cultural acceptance of LGBT rights many years before any legal or policy changes were enacted. Working together, human rights and social justice groups have pressured multinational corporations to adopt social responsibility codes and join the UN Global Compact in order to voluntarily regulate their practices.

Ultimately, a human rights organization's decision about which campaigns to pursue, which partners to join, and which methods to employ are dependent upon its local context as much as upon global trends. But we should be clear that the global human rights movement would be woefully inadequate and incomplete if it failed to incorporate social justice concerns.

Human rights and social justice organizations have the opportunity to build effective social movements in areas where their values, goals, and methods converge. This does not guarantee success, but it does take advantage of the philosophical and strategic overlap between these two arenas of activism. It does not promise an end to all economic and social inequality, but it does hold the potential to mitigate the most pernicious effects of extreme inequality.



## Seeking socioeconomic justice

*The divide between civil and political rights and economic, social and cultural rights has undermined the realization of all human rights by effectively giving cover to governments that want to ignore their human rights obligations. The international human rights movement must challenge economic actors and systems and recognize that it has to rethink its Western construct of impartiality.*

### Introduction

The long-running debate within the human rights movement on the differences between civil and political rights and economic, social, and cultural rights has too often led to an assumption that the traditional tools of human rights activists, such as documentation, naming and shaming, standard setting, and litigation, are unhelpful in campaigning for the realization of economic, social and cultural rights.

Inherent in this assumption is the belief that realization of these rights is primarily related to resources. How a state allocates its resources is seen as primarily a political not a human rights question. Complicating this debate has been the deliberate conflation by many developed countries of democracy with capitalism and open markets. States are pressured not just to respect civil and political rights but also to dismantle protective economic policies such as trade tariffs, and to allow the market to determine the price of food, health care, school fees, and housing rather than to provide subsidies that ensure people can enjoy the rights to food, health, education, and shelter.

In a long-running debate between Leonard Rubenstein and Kenneth Roth published in the *Human Rights Quarterly* (Roth 2004b), Roth said that human rights organizations

can only do effective work on violations when there is a clear violation, a clear violator, and a clear remedy. This model, Roth argues, is effective in addressing violations of civil and political rights, and is applicable to violations of economic, social and cultural rights only when they can be forced into this analytic framework.

Many violations of economic, social, and cultural rights do fit within this framework. Both *de jure* and *de facto* discrimination by states is one of the largest drivers of violations of economic, social, and cultural rights. Similarly, failure to prevent or at a minimum ensure an effective remedy for discrimination by non-state actors also drives these violations.

I would like to explore the assumptions behind the violation, violator, and remedy model as it applies to civil, cultural, economic, political and social rights, and explore how the persistent treatment of economic, social and cultural rights as significantly different from civil and political rights undermines fulfilment of all rights. I want to then examine how the assessment that economic, social and cultural rights being primarily a resource question raises the issue of the human rights system's silence on political, economic or religious structures. I will argue that although human rights organizations or advocates should not be conducting advocacy regarding allocation of resources except in some specific circumstances, they must address deeper structural causes of human rights violations by revising their notion of impartiality.

Let's explore China and the US. Although the famous 'iron rice bowl' which supposedly provided cradle to grave economic security for the people of China has long been

broken, the Chinese government proclaims that it respects economic, social and cultural rights. China produces approximately one-third of the global annual output of coal, but it accounts for more than two-thirds of the world's mining-related deaths (Mining Technology 2014). Miners in China do not have the right to organize. This makes it impossible for people working in the mines to collectively demand safer working conditions.

The US claims to be a leader in its respect for civil and political rights. The government leaves realization of economic, social, and cultural rights to the market. According to the National Coalition for the Homeless, the leading causes of homelessness in the US are lack of affordable health care, mental illness, drug addiction, and domestic violence.<sup>1</sup>

Many homeless people are disenfranchised. Homelessness is criminalized in the US (Cantú 2014) and homeless people face incarceration because they violate laws which prohibit things such as 'urban camping' or public urination. If homeless people cannot vote, they cannot influence policy makers to implement programmes for housing for all. Civil and political rights fail to protect economically and socially marginalized people in the US.

### **Violator or system?**

When documenting human rights violations, it is easy to focus on the individual actor – the bad cop, the corrupt bureaucrat, the brutal predatory military commander. Individuals, acting under the colour of state law, are relatively easy to identify, to get evidence against, and to demand accountability of. But sometimes it is easier to focus on the individual while ignoring the ways that systems either allow for these individual 'bad actors' or actually create them. Additionally, focusing on individual violators allows the state to claim that the bad cop was 'rogue', the corrupt bureaucrat an 'exception', or the brutal military commander was acting beyond his authority.

Sometimes the failure of the system is relatively easy to analyse and to fix. Human rights activists know how to prevent torture. Torture must be clearly defined as a crime within the penal code. Rules of evidence must ensure that the testimony of a person claiming that s/he has been tortured is not weighted as inherently less credible than that of the person accused of committing torture. Police and prison guards must all be trained about their obligation to refrain from committing or tolerating acts of torture. They should understand additionally that any 'confession' or evidence obtained through torture cannot be used in a court of law except as evidence that torture occurred.

Most safeguards against torture are procedural. A person must only be detained after the authorities have established probable cause; the detainee must be informed of why s/he is being detained, be apprised of where s/he will be held, have immediate access to a lawyer, and be brought before a judge within a reasonable time to hear the charges. Should a detainee report torture, either to judicial or police authorities, an independent investigation should be undertaken – including an assessment of the detainee by trained clinicians to document evidence of torture. Finally, any individual found to have committed torture should be held accountable for the crime of torture.

Governments can and should prevent torture by putting clearly defined systems in place and monitor the effectiveness of such systems. Documenting individual incidents of violations and identifying violators are primarily effective in exposing the problems and failures with the systems. Preventing torture requires the state to invest in its criminal justice and policing systems. It is an ongoing investment.

The need for that ongoing investment becomes apparent when addressing discriminatory application of the criminal law and the impact on marginalized communities. The fastest way to understand the political and social fault lines in any society is to visit its prisons. Not only can one see who gets caught up in the criminal justice system but also what laws are used to drive marginalization of disempowered communities through that system.

<sup>1</sup> See: <http://nationalhomeless.org/about-homelessness/>.

In Afghanistan, the only women's prison houses women and girls, many of whom are facing charges of committing "moral crimes", i.e., having sexual relations outside of marriage (Khamoosh 2014). Others are being held without charge because their 'crime' is fleeing an abusive relationship. That women are charged with moral crimes based on pseudo-scientific 'virginity tests' demonstrates the systematic bias against women that permeates the criminal justice system and the larger society. Reforming the criminal justice system to bring it into compliance with international standards would require significant investment in reform effort but also in gender equality and women's rights.

Afghanistan is not unique. Roma in Europe, African-Americans in the US, Indigenous Peoples in Australia, immigrants in South Africa, Palestinians in Israel... The list goes on. The scourge of discrimination and disparate treatment is a powerful lens in understanding how all human rights are inextricably linked.

Of the rights enumerated in the Covenant on Economic, Social and Cultural Rights (ICESCR), education is the most well-articulated. State parties are required to ensure that: "Primary education shall be compulsory and available free to all..." While all the rights in the ICESCR must be progressively realized, the right to universal primary education must be implemented pursuant to a plan within two years.

As with the criminal justice system, documenting violations of the right to education can focus on individuals: the administrator who demands bribes from parents, the teacher who demands sexual favours from his students, a school governing board that excludes girls from the classroom. But an exclusive focus on individual bad actors can obscure the failure of the government to put in place the systems needed to realize the right to education.

The criminal justice system and an education system may seem worlds apart. However, both must be established in law because they must be established and administered consistent with the obligations of international human rights laws. Both must be regulated to ensure that the

people who work within these systems are qualified and overseen. Both must be accessible to all. The content that drives their work is different – but as police must work with a well-articulated penal code, so teachers must work with well-developed and comprehensive curricula. Once the two systems are subject to comparison, it is obvious that both require significant resources.

## Resource allocation and human rights

That being acknowledged, what is a subject of great debate is who makes the decisions about allocation of resources – either within the criminal justice or education systems or between these and many other systems? And does the human rights framework provide guidance or principles that inform how those resource decisions are made?

Roth argues that international human rights actors are ill-placed to make these decisions and therefore cannot work on issues of resource allocation. While it is true that human rights organizations or advocates working at the global or regional level should not advocate on allocation of resources except in some specific circumstances, it does not mean that human rights advocates cannot engage in meaningful advocacy about decision-making.

Which brings us to the role of democratic societies in the human rights framework and the role of the justice system: many human rights organizations avoid the question of political systems, preferring to focus on whether a government respects rights. The International Covenant on Civil and Political Rights (ICCPR) tries to avoid calling explicitly for specific political or legal systems as fundamental to the realization of human rights, yet it is implied within the Covenant that the system is democratic ("The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those that are imposed in conformity with the law and which are necessary in a *democratic society*" (*emphasis added*)).<sup>2</sup> Article 26 of the ICCPR further assumes the existence of a justice system that ensures equal protection

<sup>2</sup> ICCPR, Article 21. See also Article 22.

of the law (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”). This article is broader than Article 2, which prohibits discrimination with regard to the laws enumerated *within* the ICCPR because equal protection of the law would cover all laws.

The question of democracy and the role of the justice system were highlighted during the uprisings in the Middle East and North Africa and the subsequent protests that swept around the world. Starting in Tunisia, these protests were a cry for “bread, freedom, social justice, and dignity” (“*aysh, hurriya, adala ijtima’ia, karama*”). There was no attempt to separate out the desire for economic security and opportunity from an end to repression and access to justice. People living at the intersection of repression and corruption know full well that the two go hand in hand.

Thus the debate is not how civil and political rights are different from economic, social and cultural rights but rather how to build a participatory system of government and a justice system that are designed to ensure respect for all human rights for all people.

### **Illusion of impartiality**

Human rights activists who have maintained impartiality with regard to political or economic systems must ask themselves some hard questions in the wake of the popular uprisings that were born in the Middle East and North Africa. For example: “Did refraining from calling Zine el-Abidine Ben Ali a dictator protect the rights of people living in Tunisia?” “Does remaining agnostic on the free flow of capital while restricting the flow of labour provide protection for migrant labourers in Abu Dhabi?” “Does remaining silent on issues of trade barriers support the rights of farmers in Senegal and food security for people living there?”

And perhaps the most painful question is: “Does impartiality fail people in developing countries who see the silence not as a core value but rather as a betrayal of their rights?” Behind this assessment is the perception that human rights advocates working at the global level have largely been privileged, and that this privilege has flowed directly

from their citizenship of countries with long histories of exploitation of the people and resources in developing countries. The impartiality, when analysed through this lens, seems more self-interested than principled.

Which brings us to the issue of democracy and human rights. It is widely accepted that resource decisions have a huge impact on all human rights. Underpaid police often rely on bribes to feed their families and in doing so undermine the integrity of the justice system and people’s trust in the police. Marginalized communities, even in the wealthiest countries, are often underserved because their voice is stifled with regard to the allocation of resources.

So democracy is a necessary, though not sufficient element of a rights respecting society. How does / should this work? In democracies, people regularly vote either directly on propositions related to resources or for people to represent their interests in these debates. For a democracy to be functional within a state, arguably all those who are subject to the government must have the right to participate in the democratic processes. This includes all people. Some, such as infants and young children, may be represented through their families – but their interests must be represented. Others who have traditionally been excluded should be represented, e.g., residents who are not citizens as well as migrants and their families in irregular situations. I will address the latter in the context of the open markets issue.

I am focusing less on elections and more on being able to engage in the political debate, whether it is about if drugs laws should be reformed to end criminalization or whether drugs should be made available for the purposes of palliative care. I use this example specifically because the issue of a state’s drug policy may be about the criminal justice system or the right to health, demonstrating that the silos governments have attempted to build around different rights simply cannot withstand interrogation.

This is not to say that elections of representatives are not important. But voting every few years for members of parliament without the ability to both demand political

debate and participate in it, means that democracy is largely constructed as a single act every few years, not a participatory process. In addition to electing representatives, people should be able to directly influence government policies. Doing so effectively implicates the exercise of myriad rights. For example, for an indigenous family in rural Guatemala, the ability to participate in debates about access to education for children is critical. But to be able to participate in a meaningful way, that family needs to have information in a timely and accessible form, and a seat at the table. The right to information must be buttressed by freedom of expression and assembly and the equal protection of the law.

A true democracy thrives on transparency. A government may argue that it is too expensive to build schools for children in rural areas where indigenous peoples primarily live – a classic defence that progressive realization requires resources. But what is cast as a resource issue can only be properly analysed if the government discloses how its education system is designed, accessed, and funded. Analysis of the allocation of resources may reveal that the state either directly distributes more resources to those who are powerful or indirectly subsidizes education for the privileged – not those with the greatest need. Global human rights organizations should advocate for the conditions of meaningful participation in democratic processes and can do so without having to advocate for any specific position.

### **Limitations of democratic systems and the subversion of democracy**

While a democratic system as referenced in the ICCPR is arguably necessary for the realization of the full array of human rights, it is not sufficient. The risk of a purely democratic system is that majoritarian rule will lead to the deprivation or under-resourcing of rights of those who are politically or economically marginalized. An independent judiciary working within the human rights framework is a counterbalance to such majoritarian impulses. If domestic legal systems fail to provide this counterbalance to protect those who are either marginalized or outnumbered from the tyranny of the majority or the self-serving policies of the privileged, regional and international human rights mechanisms come into play. With access to information and understanding of their rights and

the human rights system, those whose rights are under fire by majoritarian or discriminatory systems can turn to regional and global mechanisms.

We have seen persistent undermining of both democracy and decisions regarding equitable allocation of resources by international financial institutions and private economic actors. The structural adjustment policies imposed by international and regional financial institutions and other governments on many developing countries in the 1980s have been resurrected most recently to address economic turmoil in the Eurozone.

These policies are based on an assumption that austere focusing on cutting the provision of services by the state is the answer. In many cases it means that people will be deprived of health care, education, etc. These completely foreseeable consequences are not analysed as violations of the right to health and education. Human rights are dismissed as an expensive externality. These policies are not just undermining human rights, but they have long-term consequences as under-educated children grow up to have limited opportunities and therefore may become just single individuals in the vast pool of cheap labour.

Besides international financial institutions, other key actors that may subvert democracy and undermine rights in a country are private economic actors. Some powerful corporations have revenue that exceeds the GDP of the majority of countries in the world (Trivett 2011). Corporations are accountable to their shareholders and the fiduciary duty of the Board is to maximize profits. Although the Ruggie principles<sup>3</sup> proclaim that corporations and other economic actors have a responsibility to “at a minimum,

3 The United Nations Guiding Principles on Business and Human Rights (also ‘Ruggie Principles’) are non-binding requirements for companies to respect human rights, and proactively take steps to prevent, mitigate and, where appropriate, remediate, their adverse human rights impacts. The Principles were developed by John Ruggie as the UN Special Representative for Business and Human Rights, who presented them to the UN Human Rights Council in June 2011. See: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf#sthash.0ZPaPI71.dpuf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf#sthash.0ZPaPI71.dpuf).



respect human rights”, this respect is subjugated to the profit motive. Despite attempts to prevent corruption, many companies see corruption as the price of doing business and have little regard for how it undermines human rights and destroys any system of accountability.

This dynamic of corporations undermining democracy and human rights is most apparent in the arena of trade. Developed countries and corporations are the champions of ‘free trade’ and ‘open markets’ which are often touted as a silver bullet to cure poverty. Scant attention is paid to either the historical reality of how developed economies were able to build sustainability through protectionist practices. Instead, developing countries are effectively corralled into opening their markets and dismantling any trade tariff even when such action will destroy a sector such as domestic agriculture. These policies put people within these countries at risks when fluctuations in the market mean that instead of dumping cheap food into these markets, trade is restricted and there is no ability to support food sustainability at the domestic level.

For example, investment in bio-fuels led to shortages of food staples, spikes in the prices of food staples, and unrest in many countries in the mid to late 2000s (Chakraborty 2008). If developing countries had the space to put in place even temporary trade tariffs on foods, they could support the growth of domestic agriculture and ensure food sustainability for the people they govern. As the US Supreme Court decision in *Citizens United* demonstrates, the subversion of democracy by corporate interests is not limited to developing countries.<sup>4</sup>

Finally, I would be remiss if I did not note that religious

institutions also often undermine both human rights and democracy. Besides the obvious examples of many religions in their fundamentalist form disempowering women in order to ‘protect’ them, religious intolerance often expresses itself in the discrimination and persecution of other religious groups. The systematic persecution of the Rohingya both by the Burmese government and by groups of radical Buddhists has driven them into IDP camps where they have suffered immense deprivation and exploitation and into an apparently hopeless quest to see refuge in Southeast Asia.

### Looking forward

The dashed hopes and aspirations of the protestors who took to the streets starting in Tunisia and sweeping first through the Middle East and North Africa as part of what was dubbed the ‘Arab Spring’ and which then caught on in protests in many developed countries in the ‘Occupy Movements’, are evidence of how far we are from having rights-respecting societies across the world.

These failures point to the need for the human rights movement – in all of its diversity – to rethink how to make change. While legal standards, like democracy, are necessary, they are not sufficient. The challenge is meaningful implementation of those standards and dismantling the rampant inequalities that drive human rights violations.

Human rights abuses are a function of abuse of power. While traditionally human rights organizations have tended to focus on abuse of power by agents of the state in the exercise of their policing and security powers, in fact, it is abuse of all types of power – the power of male privilege, of the gun, of hetero-normativity, of the dollar – that deserve our attention.

In short, both human rights and democracy are under attack on myriad fronts. The human rights movement cannot retain legitimacy and credibility if it does not take a lesson from its history and document, expose, name and shame those actors and sectors that are denying people dignity and equality. The most effective mode of exposing may be to find the case of the individual ‘bad actor’ but

4 Supreme Court of the United States (2010) *Citizens United v. Federal Election Commission*, Appeal from the United States district court for the district of Columbia, 21 January, No. 08-205, 558 U.S. 310. The court held that the First Amendment prohibited the government from restricting corporations (including non-profit corporations) from making independent expenditures, e.i. political campaign communications. The decision was criticized for giving private interests even more influence on American election campaigns.

the solutions must be systems-oriented. For human rights to work, the political and economic systems must be scrutinized for how they undermine the full array of civil, cultural, economic, political and social rights.

### **Some thoughts on implementation and conclusion**

There are two fundamental principles that inform the implementation of human rights standards. The first is that a state may not choose which people enjoy their rights. All people are born free and equal in dignity and rights. There are no allowances for exclusion of people because they are 'different'. The other principle is that a state may not decide which rights to fulfil. A state may not legitimately claim, for example, that it recognizes the right to work,<sup>5</sup> but not the right to freedom of association.<sup>6</sup>

It is only when states adhere to the principle of the universality of rights and the interdependences of rights that the promise of human rights will be fulfilled.

Human rights activists and organizations must proactively demand that governments recognize the interdependence of all human rights and campaign to end the ways that governments set up rights in opposition to each other as opposed to treating them as mutually reinforcing.

But the human rights movement must also challenge actors and systems beyond the control of a single state and recognize that the concept of impartiality – the basis for not taking on these actors and systems – is indefensible in light of how they are destroying people's rights. While human rights organizations may focus on building expertise on specific rights, all organizations can make the case that the rights-respecting world envisioned in the Universal Declaration of Human Rights was built on the understanding that all people deserve to live free from want and free from fear.

<sup>5</sup> IESCR, Article 6.

<sup>6</sup> ICCPR, Article 22.



## Dear fellow jurists, human rights are about politics, and that's perfectly fine

*For decades, the global human rights community has seen human rights as a matter of law, mostly international law. Economic, social and cultural rights, however, are meant to be progressively realized making use of all available resources. The violations approach and the work on their justiciability do not address the structural factors that constrain the enjoyment of these rights. Human rights are about policy and politics as much as about law. There is room for human rights advocacy outside and beyond the limits of the law.*

### Introduction

“It is *politically* important that human rights have been codified in international and national law, but it is a mistake to believe that the legalization of human rights takes the concept out of politics” (Freeman 2002:10).

In 2013, I attended a book launch: *Failing to protect: The UN and the politicisation of human rights*, by Rosa Freedman. The book is based on a series of interviews with UN officials and, according to the author, it gives explanations about how and why the UN is unable or unwilling to protect human rights. In her view, this is the result of the “politicization” of the international human rights machinery. I remember thinking that human rights institutions must be political by definition, insofar as they are the outcome of difficult political dialogues, lobbying and diplomatic tension. Why are we surprised? What is so wrong about the idea that human rights are a political notion subject to political negotiation, just like anything

else in international affairs? Unfortunately, I did not get the chance to ask my question. Luckily, I have now been given the opportunity to reflect on it in this paper.

Human rights are often conceived as moral claims written in legal terms. In this sense, they would be somewhere prior and above the political discourse. Against this assumption, I hereby argue that defending human rights effectively requires understanding and working with policy and politics, not only law. International human rights are essentially what human rights advocates make of the pledges taken by states when endorsing human rights documents and ratifying treaties. The framing, allocation and construction of meaning is a political process that transcends the limits of the law. This paper builds the argument in relation to economic, social and cultural rights (ESCR) in opposition to the violations approach and the work limited to making the case of their justiciability.

### Beyond the violations approach to ESCR

Nearly three decades ago, in one of the earliest attempts to conceptualize the meaning of ESCR in international law, Philip Alston (1987: 372) wrote that “for a variety of historical, ideological, pragmatic, and other reasons, there remains a considerable reluctance on the part of many, if not most, human rights NGOs to become involved in the field of ESCR”. A few years later, Alston (1990: 9) criticized Amnesty International for its then reductionist conception of rights, one which “mirror(s) more closely values associated with the Western liberal tradition”, namely, civil and political rights. Since the mid-1990s and principally during the decade of the 2000s, however, the power of human rights has extended to an area that had remained unexplored

1 I am indebted to Doutje Lettinga, Lars van Troost and Angelos Kontogiannis-Mandros for their valuable comments. Opinions and mistakes are only my own.

thus far. Human rights organizations have finally integrated ESCR in their mission statements and strategic and operational plans.

In 1996, Human Rights Watch adopted an interim policy on ESCR (Mutua 1996: 619), and in 2001, Amnesty International incorporated these rights into its mission, launching a global campaign in May 2008 that linked poverty and human rights: 'Demand Dignity'. It is fair to say that, while the largest human rights organizations struggled with the challenge of ESCR, a number of smaller groups (Centre on Housing Rights and Evictions, COHRE; the Center for Economic and Social Rights, CESR; FoodFirst Information and Action Network, FIAN; the International Commission of Jurists, ICJ) had already started making important contributions to the interdependency of all human rights.

At the same time, some groups outside the traditional sphere of human rights, such as indigenous peoples, feminist organizations, trade unions and development NGOs, have also started to speak the language of human rights. This form of rapprochement opened the door to what Nelson and Dorsey (2008) call "new rights advocacy", that looks at issues traditionally perceived as belonging to the realm of social justice (housing, health, work, education, minimum standards of living etc.) from the perspective of human rights and human rights law. Nelson and Dorsey rightly observe that the 'newness' of the "new rights advocacy" refers to the 'advocacy' and not to the word 'rights', because, in fact, standards themselves are far from new. The 1948 Universal Declaration of Human Rights enshrines several ESCR, and the 1966 International Covenant on ESCR entered into force in 1976. In other words, law and international law do not explain why it took so long for human rights organizations to accept the challenge of defending ESCR.

While it is true that the number of human rights groups working on ESCR has mushroomed in the last two decades, there is still a great deal of confusion about the implications of working for these rights, and I believe that the very legalistic violations approach adopted by most NGOs does

not sufficiently address the challenges posed by the recognition of ESCR as human rights.

The "violations approach", initially formulated by Audrey Chapman (1996) and subsequently endorsed in the 1997 Maastricht Guidelines on Violations of ESCR, is broadly based on the identification of laws, policies and actions that have a direct causal relationship with infringement of the principle of non-discrimination and the minimum core content of the ESCR recognized in the relevant treaties. More recently, Chapman (2007: 156) wrote that the violations approach was meant to be "a supplementary and not a sole strategy for monitoring" ESCR and that her motivation "was to overcome some of the limitations of the progressive realization formula and to deal more meaningfully with the most flagrant abuses of these rights". Nonetheless, the violations approach had already received a lot of attention among human rights practitioners, very much accustomed to the victim-aggressor juridical lens of civil and political rights. For example, Kenneth Roth (2004a), Executive Director of Human Rights Watch, famously argued that international human rights organizations are best at "naming and shaming", and that they can effectively do so only when there is relative clarity about violation, violator and remedy.<sup>2</sup> Therefore, they should restrict their work on ESCR to cases where governments are guilty of arbitrary or discriminatory conduct. Roth's article hardly went unnoticed and received critiques (Rubenstein 2004; Robinson 2004; Nelson & Dorsey 2008) arguing that human rights organizations must devise additional strategies to the conventional "naming and shaming", and try to influence policy and social services, making proposals for the most effective allocation of resources.

Chapman's "violations approach" and Roth's "naming and shaming" attempt to operationalize the meaning of ESCR, but they do so at the expense of the progressive realization of ESCR, proclaimed in Article 2(1) of the International

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2 It is important to note that the minimum core content of rights is deemed to cover also the obligation to fulfil, which is missing in Roth's framework. This would be an important distinction between Chapman and Roth.

Covenant on ESCR.<sup>3</sup> This sacrifice is probably made in the name of causality and responsibility, because it is too difficult to find out the direct cause of hunger, maternal mortality or poor housing, and therefore it is also too difficult to determine who must be held responsible. However, we must remember, as Deborah Stone (1989: 292) does, that “complex cause is sometimes used as a strategy to avoid blame and the burdens of reform”.

Attempting to understand the complex causal relationships behind the lack of satisfaction of human rights is an ambitious project that would require working with tools in budget analysis, socioeconomic policy and taxation. Yet, human rights groups often feel more comfortable working with traditional legal tools, particularly the demand for the justiciability of ESCR.<sup>4</sup> Generally, there are fewer accountability mechanisms for ESCR than for civil and political rights. In order to erase this gap, human rights practitioners have advocated the recognition of these rights into domestic and international legal texts and the creation of independent monitoring mechanisms to examine violations on a case-by-case basis. To this end, the International Network for Economic, Social and Cultural Rights hosts a very extensive database of domestic and international case-law,<sup>5</sup> the International Commission of Jurists (2008 and 2014) has issued two wide-ranging analyses of comparative experiences of justiciability of ESCR in different countries, and researchers have studied with remarkable interest the op-

portunities offered by regional systems of protection of human rights in the Inter-American (Feria-Tinta 2007), European (Leijten 2014) and African systems (Ssenyonjo 2011).

At first, the placement of the law at the centre of the discussion makes sense, bearing in mind that ESCR have historically been neglected in the conventional legal discourse. The open question, though, is whether the judicial recognition of ESCR is the most effective way to improve people's enjoyment of these rights. The dataset of the Toronto Initiative for Economic and Social Rights tells us that more than 90 per cent of the Constitutions in the world recognize at least one socioeconomic right, and 75 per cent of them make at least one of them justiciable.<sup>6</sup> However, no clear correlation has been identified between an increase in terms of social justice and the recognition of ESCR as justiciable rights. “Litigation necessarily resolves relatively narrow issues; underlying structural factors are generally left unaddressed” (Yamin 2005: 1220). I believe it is time to accept that these factors can only be understood by policy analysis and tackled by political means.

The excessive focus on justiciability is one of the reasons why the element of the progressive realization has been insufficiently attended thus far. Too many human rights practitioners still see human rights as a matter of contention but only in court. In the name of impartiality and the alleged supra-political nature of the law, they do not want to be seen as entering uninvited into the political arena, which in their view belongs to political institutions and perhaps also to other organizations and social movements, but not to human rights groups, which must stay away from politics.

Human rights practitioners and organizations are spot on when they defend the justiciability of ESCR as a matter of principles, because this is probably the longest degree of separation between these rights and the traditional civil and political ones. However, they (we) should remain alert because, by focusing too much on the violations approach and the need for judicial or quasi-judicial accountability mechanisms,

3 Article 2(1) ICESCR, surely one of the most widely vivisected clauses in international human rights law, says that “each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively the full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (italics are mine).

4 “The term ‘justiciability’ refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties” (ICJ 2008: 6).

5 See: <http://www.escr-net.org/caselaw>.

6 See: <http://www.tiesr.org>

we may be missing important political opportunities to strive for the progressive realization of ESCR. Doing so effectively will definitely require us to play the game of politics, and we need to assess whether we are ready for that.<sup>7</sup>

### Playing the politics of human rights

One of the first measures adopted by the new Greek government after Syriza's victory in January 2015 was to prohibit mortgage evictions of first homes up to € 300,000, and to prevent banks from reselling the mortgages to third parties.<sup>8</sup> A similar but more moderate measure had been in place before with a right-wing party in power. International legal standards on the right to housing do not impose a measure of this kind. Based on General Comment No. 7 of the UN Committee on ESCR (1997),<sup>9</sup> we can argue that Greek authorities must ensure that evictions are the last resort, and when domestic law does not provide legal remedies or procedures to challenge them, evictions are considered to infringe the right to housing.

Going a bit further, we may recall that it is the standing position of the European Court of Human Rights that, given the extent of the interference with the right to respect for the home and private and family life, an independent tribunal must be allowed to examine the proportionality of the eviction on a case-by-case basis.<sup>10</sup> However, these are very important but essentially procedural points. In principle, as long as there are independent mechanisms

to assess the particularities of the case, it is not possible to say that Greece has violated the right to housing by conducting or allowing mortgage evictions.

This would be the conclusion, of course, unless we accepted the challenge of the progressive realization of ESCR and the resulting general principle of the prohibition of deliberate retrogressive measures. If we accept this challenge, we will have to explore to what extent Greek public authorities have been allocating the necessary resources to achieve progressively the full satisfaction of the right to housing. Furthermore, just like the UN Independent Expert on Foreign Debt and Human Rights (UNHRC 2014), we will have to pay attention to the multiple layers of responsibility, considering the pressure exercised over Greece by the European Commission, the European Central Bank, the IMF and other European countries, and taking into account the large sums of money received by banks from European taxpayers under the assumption that this would prevent the system from collapse.

The measure adopted by the Greek Syriza government may not technically be *required* by international human rights law, in the sense that not doing so would not constitute an infringement of international legal standards. Nonetheless, preventing the eviction of families who cannot make their mortgage payments as a result of unemployment derived from the economic crisis may be a very reasonable measure that takes the Greek people just a bit closer to the full satisfaction of the right to housing. Note that the government bears the burden to prove that this is the right policy to that end. The policy may very well be ill-founded and disoriented, but taking human rights seriously means that we must address this dilemma from the starting point that all public policy ought to be inspired by the ultimate goal of making human rights real. And human rights organizations have a contribution to make in this regard.

Human rights advocates must dare to overcome the traditional liberal notion that sees human rights only as the shield with which individuals protect themselves from Leviathan. Human rights are indeed shields, but they can also be constructed politically as a set of guidelines for

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7 Find a very thought-provoking discussion about the limits and opportunities of legal mechanisms for the enforcement of ESCR at openGlobalRights on openDemocracy. Available at: <https://www.opendemocracy.net/openglobalrights/debating-economic-and-social-rights>.

8 The suspension of evictions will have to be lifted as a result of the third economic adjustment program between the EU and Greece (July 2015).

9 UN Committee on Economic, Social and Cultural Rights (CESCR) (1997), *General Comment No. 7: The right to adequate housing: forced eviction (Art. 11, Para.1, of the Covenant)*, 20 May, E/1998/22.

10 European Court of Human Rights (ECtHR) (2012), *Buckland v. UK*, 18 September (App. No. 40060/08), para. 65, and the case law mentioned therein.

political action. This is the reason why advocates must move on from the very limited violations approach and learn and apply the rules of the political game to get the most out of the principle of the progressive realization of ESCR. The power of human rights is not so much their moral superiority, but their political force and their ultimate transformative potential for society.

Even within the limits of legal acceptability of state behaviour, some policies are better placed than others to maximize the resources to fulfil ESCR. The identification of the actual policies that are best suited to achieve this goal is a technical issue as much as it is political. Governments bear the burden of proof and the role of opposition groups and civil society organizations is to hold them to account and also to propose alternative ways of achieving the progressive realization of all human rights. The time of ESCR will come not when policy A trumps the alternative policy B, but when both A and B are set out with the goal of achieving these rights progressively. Then it is up to politics to choose between them.

### **Not exempt of risks: implications for human rights organizations**

I have argued that taking ESCR seriously requires moving beyond the limits of the law and accepting the political nature of these rights. In fact, I would extend this claim to all human rights, not only the socioeconomic ones, but I will leave this discussion for another paper.

I guess human rights advocates could pretend that human rights belong to the realm of law and morality, not politics, but this would not only be a strategic mistake, it would also be a fallacy. International human rights are recognized in international treaties, but the actual meaning of each right very much depends on the framing and constructive work of human rights groups and defenders.

The politicization of human rights is of course not exempt of risks. Firstly, by stretching the limits of human rights, we may be accused of human rights inflation, that is, of expanding the idea of human rights to an ill-defined and potentially unlimited number of policy areas. It was Giovanni Sartori

(1970: 1035) who taught us that the net result of conceptual stretching can be that “our gains in extensional coverage tend to be matched by losses in connotative precision”. Secondly, extending human rights beyond more or less manageable legal limits may give the impression that human rights advocates are promising more than they can actually deliver, which is one of the reasons why Kennedy (2002) wondered if the human rights movement itself is not “part of the problem”. And thirdly and perhaps more pressingly, human rights groups could also be blamed for lack of impartiality, inasmuch as accepting and embracing the politicization of ESCR may force them to reject the traditional “agnosticism” (Saiz 2009: 287) about the compatibility between human rights and different economic and political systems.

These are risks that we should not take lightly. Yet, accepting the political nature of human rights, apart from being a more accurate description of their real nature, offers some important lessons and political opportunities as well.

If human rights in general and ESCR in particular are about politics, this means that by definition they cannot be totally satisfied. The *full realization* Article 2(1) ICESCR speaks about is an unattainable goal. Therefore, if a given human rights organization decides not to work on ESCR in one country or region, this cannot be because ESCR are *fully realized* there but because the organization has made the strategic decision to focus elsewhere, a strategic decision that can only be justified in political terms, not in legal or moral ones.

Sceptics have historically dismissed human rights because they were either “too abstract to be real or too concrete to be universal” (Douzinas 2000: 200). Yet, a political approach to human rights like the one suggested in this paper may help us “localize human rights” (Acharya 2004; De Feyter 2007), that is, adopting a bottom-up approach to the construction of the idea(s) of human rights. Localizing rights means taking the needs and wishes of local people as the starting point for the interpretation of existing norms and for the construction and consolidation of new ones, while respecting the universal reach of human rights.



The violations approach does not take us very far, or at the very least there is room for human rights action beyond the language of this approach. Human rights scholars and practitioners must explore other areas, such as fiscal policy.<sup>11</sup> That said, this does not mean that strategic litigation and the violations approach must be struck down completely. The world needs judges that are willing and able to apply the rights recognized in the law. The world also needs human rights groups that focus on this particular area of work. In other words, this is not an attempt to find fault with Audrey Chapman or Kenneth Roth or even to suggest that Amnesty International must either change or perish. To the contrary, I believe the global human rights community must be open and diverse enough to embrace different approaches and strategies.

The politicization of human rights in general and of ESCR in particular is not exempt of risks but it also offers opportunities that can make human rights advocates more effective and more locally relevant in improving people's lives. Taking ESCR seriously and responding adequately to some of the key challenges of our time demand audacious strategic decisions. Just like with other ideas before, the time of human rights may pass and new utopias may replace them. If that were the case, I would personally prefer to believe that we did our best to extract all the juices out of it while we could rather than regretting than we did not go far enough.

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11 See 'Human Rights in Tax Policy' at the website of the Center for Economic and Social Rights. Available at: <http://www.cesr.org/article.php?id=1622>.

## **Back to the future: human rights protection beyond the rights approach**

*This essay recognizes human rights as something more profound than legal rights. In the context of the rise of global capitalism, being faithful to human rights' intrinsic counter-hegemonic nature requires contemplating a picture larger than rights litigation. This involves reassessing the efficacy of human rights instruments in order to address the structural causes impairing human rights.*

### **Introduction**

This essay critically assesses the assumption that a so-called 'rights-based' approach should be the primary way of pursuing justice through the law. While not sceptical about the fact that human rights have an emancipatory dimension, in this essay I argue that resorting to an approach exclusively or mostly based on legal rights is not likely to unfold it. Human rights make a meaningful contribution to emancipation whenever they recouple with their counter-hegemonic nature. The structural sources of exclusion, indignity and environmental damage – today's hegemony – are connected to one phenomenon: the rise of global capitalism. Hence, the question of whether human rights are tools at the service of human emancipation requires asking if human rights are meaningfully engaging in the enterprise of domesticating the global capitalist economy.

This short essay deals with that question. It does so on the one hand by taking the view that the rights approach fails to seriously confront the human rights encroachments deriving from global capitalism. On the other, the essay explores avenues that could restore human rights' counterhegemonic nature. This plan could be summarized in the following points. Due to space constraints I will deal only with the first two of them. a) At the conceptual level I

suggest restructuring the interplay between human rights and democracy, so that people reappropriate human rights. b) With respect to social rights, I propose reorienting both its normative content and redress mechanisms. These should shift back from their present individual-centred focus towards their truly social and more duty-oriented nature. c) Internationally, and in line with the opinion of the Independent Expert on the Promotion of a Democratic and Equitable Order (OHCHR 2015), 'the human rights regime', should more actively prevent the harmful effects derived from free trade agreements (such as the TRIPS Agreement, or the still in negotiation TPP and TTIP) from limiting or in any way conditioning international human rights law. d) Regionally – in a proposal directed primarily at the governments and human rights movements of the Global South – I suggest strengthening peoples' right to self-determination in the economic domain by supporting human rights grassroots organizations reclaiming concepts such as 'food sovereignty' (De Schutter 2015), notion that involves breaking up with fundamental aspects of the heterodoxy of global capitalism.

### **The rights approach**

Why a vast majority of peoples are deprived of development dynamics in the 21st century has a number of reasons. Human rights' inability to influence the global economy is a crucial one. Linked to this phenomenon, the relative indifference that the human rights academia pays to this interaction should be noted. That sophisticated jurisprudential developments are more frequently discussed than the interplay between global capitalism and human rights is not due to a circumstantial predilection from legal agents. It obeys to a more fundamental canon: the idea that addressing those interactions would entail mixing law

and politics, thus going beyond the scope of what human rights are or what they do.

By a 'rights-based' or 'rights' approach, I mean something that has both substantive and procedural implications. Content-wise a rights approach is individualistic. So prevalent is this emphasis that even in the case of social rights the receptor of a legal case is either an individual or a group of individuals, but not the community as a whole. This is problematic because the core aspect of social rights does not consist in granting entitlements to those capable of articulating them in legally sound ways (Ferraz 2011: 1660). As I shall further explain, the distinctive element of social rights lies in its communitarian and democratic normative dimension. With respect to procedure, a rights approach is, as a matter of principle, alien to political contestation (Petrova 2004: 188; Waldron 1999: 12). The problem here is that disjoining human rights from democracy impedes people from modulating human rights in line with their reality. A shift in this respect could be significant in articulating a whole spectrum of alternatives capable of opposing capitalist practices impairing human rights.

Three other features characterize the rights approach: trivialization, technicality and elitism. Trivialization is linked to the point of departure of the rights approach – the correct premise that human rights are important. However, from such a premise often follows the less convincing assumption that whatever the issue at stake (health, mining activities, the Internet, climate change) it should be looked at primarily under the purview of legal rights. This over-abundance trivializes human rights' importance (Petrova 2004: 203).

Moreover, as rights emerge from a specific place and have their specific techniques, they involve a great deal of technicality and elitism. Technicality is connected to the necessary legal expertise required for rights problems, what normally leads to their bureaucratization. With regard to elitism, this problem relates both to its Western origins, and to the fact that rights have become the well-paid job of expert lawyers and international bureaucracies. These two phenomena have led to a dismissive attitude towards the

voice of indigenous communities, student organizations, workers unions, grassroots movements of farmers, and human rights activists gathered at the World Social Forum. In this context, the counter-hegemonic nature of human rights unsurprisingly fades away.

The critical tenor of this essay does not seek to demerit the valuable contributions of the rights approach with respect to, for example, governmental accountability. However, as today's human rights challenges are located far beyond those infringements, the scope of that accountability should be re-examined.

Adapting the approach of P. Jha (2006: 15), I think that the emancipatory goal of human rights I mentioned must be carried out with deliberate intent. This does not mean getting rid of the rights approach but it requires supplementing it with a reappropriation of human rights by human rights movements. This reappropriation requires, firstly, the recoupling of human rights to democracy. Secondly, to shift towards a truly social – and not merely a legal rights oriented – definition of social rights. Naomi Klein's (2007: 119) criticism of Amnesty International illustrates the first point. Klein criticized Amnesty's aseptic approach in relation to the human rights violations that occurred in Chile during the dictatorship. She stated that the violations were only quantified, devoid of any analysis of "why" they had occurred. No mention was made of the fact that the junta was remaking the country "along radically capitalist lines". The omission produces the effect of presenting the violations as "random" violence. Nonetheless, it is only by examining the junta's "revolutionary economic project" that one can make sense of why, how and against whom such extreme repression was used.

While the accountability aim of the rights approach should be welcomed, I do not think that the context should have been underemphasized. Moreover, it is incorrect to exclusively identify human rights with combatting impunity. Crucially, human rights have also to do with the very content of the struggles of those attempting to build alternatives to capitalism.

Yet, the question remains: can human rights law embrace this perspective?

## The forgotten radical mandate of human rights

I shall begin with the critical book by Stephen Hopgood, *The endtimes of human rights* (2013), and the publication that the Dutch section of Amnesty International devoted to the discussion of Hopgood's contribution: *Debating The endtimes of human rights* (Lettinga & Van Troost 2014). In this latter publication, Frank Johansson (2014: 53) stated: "[T]he big issues of social and economic justice cannot be solved through the human rights paradigm, as it doesn't confront economic power." Although I think that the challenges faced by human rights are not limited to distributive justice, I agree with Johansson's statement. Actually, I think Hopgood's critique fails capturing these challenges. I believe that what should really create concern about 'the human rights regime' is how ill-equipped it is to contribute to domesticating the capitalism that impairs human rights. About that, Hopgood does not say much.

Today, global capitalism challenges all human rights dimensions including the very conditions of life on the planet, at least the way we know it. At the same time, in its fast economic makeover of the world, capitalism impacted both the political structure of the nation state (Jha 2006: 82) as well as human rights' substantive meaning and redress mechanisms. Worse, as I will show later on, legal rights have in some cases become instrumental to legitimizing and guaranteeing capitalist expansion. Furthermore, 'the human rights regime' lacks the capacity to hold to account the transnational compound of political and economic elites steering these negative shifts.

Climate change impacts the Earth's limited and fragile macrosystem. Scientists speak of "defaunation" in order to signify the acute loss of biodiversity as a result of human behaviour (Dirzo et al. 2014: 401). While our ecosystem has already been reacting to the rise of CO<sub>2</sub> emissions, estimates of the rise in temperature by 2100 are around 4 degrees Celsius. The consequential rise in sea levels that would follow threatens with inundating "many coastal

areas from Ecuador and Brazil to the Netherlands to much of California and the northeastern United States, as well as huge swaths of South and Southeast Asia" (Klein 2014: 13). A threat against life at this level leaves the conceptualization of the right to life falling short. This is an example of why human rights advocates should not only think of human rights violations; they should also reflect on the ability of human rights instruments to target the structural causes of those problems.

Slavoj Žižek (2011: 363), in a predicament that we could describe as *apocalyptically pragmatic*, states that "the true utopia is the belief that the existing global system can reproduce itself indefinitely". Are human rights embedded in the utopia Žižek reproaches? Interestingly, both the UN Charter and the Universal Declaration of Human Rights (UDHR), core instruments of our discipline, did not. What lay at their core was a radical and comprehensive view to which both great powers and small countries committed themselves after World War Two. Both instruments legitimized themselves because after Hiroshima and the sobering realization of the possibility of the extinction of humankind in a nuclear holocaust, the victorious central powers accepted that the world could simply not do without a platform for international dialogue in the fields of security, cooperation, and human rights.

Moreover, the central powers' attitude with respect to the UN Charter and the UDHR was shared by non-industrialized nations. These smaller countries believed that peaceful dialogue and cooperation would give them an opportunity to attain social and economic development. Later on, great powers would often instrumentalize human rights by scornfully addressing small countries' claims of respect for their sovereignty and self-determination. Yet, small countries never understood human rights as a top-down, externally imposed process. The relentless claims from organizations such as the Non-Aligned Movement exemplifies this (Prashad 2014: 26-27).

All the previous shows that the UDHR is incorrectly interpreted under the narrative of the rights approach advocated by organizations such as the International

Commission of Jurists where, apparently, all it takes for the splendid realization of human rights consists in improving access to justice and rights protection in court (ICJ 2008). If, as I believe, the challenges faced by human rights today are taking place at a more structural scale, the bad news is that the greatest challenge to human rights lies not in becoming more effective, but exactly its opposite – the human rights movement must become self-aware of the inefficacy of its mechanisms (human rights litigation in the first place) as a pre-requisite to its reinvention. The encouraging news is that if in 1948 the world accepted that business-as-usual would not do the job in the international arena, we may well accept that once again.

In the coming sections I will do the following: Firstly I shall illustrate a normative shift derived from the rights approach in the field of social rights. Second, I shall get back to the point of recoupling human rights with democracy.

### Capitalism's erosion of social rights

Processes of privatization, marketization and liberalization contracted the extension and quality of social services. This has happened because of another, more important shift. Capitalism has changed *our understanding* of what rights are and of how to guarantee them. When William Henry Beveridge (1870-1963) in 1942 delivered the report that served to establish the National Health Service (NHS) in the United Kingdom, he did so on the understanding that social rights consisted in granting access to health care to everyone irrespective of their ability to pay. That understanding is reflected in the NHS' founding principles of comprehensiveness, universality and equity (Pollock 2005: 83). Some of us still think that it is this perspective of social citizenship that informs social rights such as the right of access to health.

But it was when capitalism in its perpetual hunt for niche markets (Crouch 2004: 83) expanded to health care that our understanding of social citizenship – which in the words of T.H. Marshall (1950: 28) had to be directed “towards a fuller measure of equality” – found itself in need of adjustment. From a focus on affordability we shifted towards choice protection (Lister 2013: 31). Choices in

health care attract consumerist sympathy, but in doing so they legitimized the appropriation of health care by business and with that, the loss of the ideas of citizenship and solidarity informing social rights.

This change of paradigm had an institutional parallel. From single-tiered health care systems we moved towards the complex structure of insurance companies, regulators, private, and semi-private providers. So strong has been the pressure to extend capitalist appropriation in the profitable domain of health care (health-related needs are both perpetual and urgent) that not even ideological consistency has been respected – allegedly neoliberal principles such as efficiency have been ignored.

Take Canada, as an example. In spite of the fact that “in terms of ratio of productivity to administrative costs” the Canadian single-tiered health care system was regarded by a series of legislative reports “as one of the most efficient [...] in the world”,<sup>1</sup> Canada began a path towards the gradual commercialization of its health care. Interestingly, the decisive blow to Quebec's noble egalitarian tradition came not from the political arena but from human rights' alleged allies – rights and courts. The 2005 *Chaoulli* ruling (ibid 2005: 860), struck down acts of parliament impeding health care commercialization under a reasoning based on the rights to life, liberty and security. As a perceptive analysis has revealed (Hirschl 2007: 60-65, 77, 83, 92), court activism, far from the elevated reasons often pled in its favour, contributes decisively to the entrenchment of a legal and institutional setting favourable to the perpetuation of capitalism.

In the developing world, excessive emphasis on a legal rights approach has brought health care systems not only not to focus on the most vulnerable (Mchangama: 2014), but also to be run in an economically unsustainable way (Gouvêa 2013: 466). In the case of Brazil for example, since middle and upper classes are more likely to have their voice heard in court, their more exclusive and expensive

1 The Supreme Court of Canada (2005) *Chaoulli v. Quebec (AG)*, SCC 35, Ruling of 9 June.

health care needs have been prioritized to the detriment of the vast majority of impoverished people in one of the most unequal countries in the world (Gouvêa 2013: 463; Ferraz 2011: 1660; Wang & Ferraz 2013: 165). And focusing scarce resources on less cost-effective interventions is an approach that has been advised against by the World Health Organization (2014: xi).

Purposeful action in line with the 1978 Alma-Ata Declaration needs to be adopted. This would allow to emphasize the importance of health planning, comprehensiveness, affordability, and universality, in line with the World Health Organization's goal of "health for all" (WHO 1978: paras. 6, 7.8, 8). Critically, it is this approach too that would have been vital in addressing contemporary crises, such as the Ebola crisis (Brown 2014; Kiemy 2014; Zinzombe 2014).

This analysis explains why under the rights approach social rights have been inhibited to reconnect with its genuinely social origins. It is imperative to shift back towards the historical and teleological routes of social rights. Namely, to re-emphasize the importance of the duties necessary to guaranteeing them. Paraphrasing García Manrique (2013: 34) social rights denote the democratic standards a community gives to itself in order to specify the distribution of wealth and opportunities necessary to satisfy everyone's needs of assistance, education and labour. Hence, as much as the challenge for the right to vote demanded the political defeat of census suffrage, we must come to terms with the idea that what social rights primarily demand is the de-commodification of key areas such as the provision of healthcare, education and other essential social services. Also – as some human rights NGOs have started to acknowledge – tax systems must be restructured with a view of redistribution (CESR 2015). It is this trend, and not the privatization of social rights' legal nature, what truly reflects commitment towards the challenge posed by the 1993 Human Rights Vienna Conference (OHCHR, 1993: para. 5). It is in the acceptance of a plural legal response that *the goal (not the means)* of universality, indivisibility, interdependency and interrelatedness of all human rights will be attained.

## Recoupling human rights and democracy

Shifting back towards new visions of human rights such as the abovementioned, as well as others promoted by human rights grassroots organizations such as the claim for 'food sovereignty', demands a different interrelation between law and politics. One, that opens the door to see in human rights something more than legal rights, along with re-emphasizing the importance of duties and collective instruments such as the right to development.<sup>2</sup> This would upscale human rights from a friendly conscious reminder, into an irritating stone in the shoes of capitalism.

These issues involve a number of practical shifts. Yet, this transformation also requires a review of the theoretical framework of human rights. Reappropriating human rights requires altering the predominant understanding of the relation between constitutionalism and democracy. Against Dworkin, who thought that if the majority and not judges set the standard of restraint with respect to individual rights "the majority [would be] judge in its own cause" (1977: 142), it must be highlighted how such a mistrust for self-government is based on a naive thought: the idea that "the minority is no longer synonymous with the oppressor" (Rosanvallon 2008: 116). To be sure, democracy is precisely about making the majority a judge in its own cause (Atria 2006: 85; Waldron 1999: 265, 297) and, unless we shift towards a government of enlightened despots, human rights advancements should be mainly conceived as advancements that a majority supports.<sup>3</sup> This does not mean that I consider law and politics the same thing. On the contrary, following Fernando Atria (2004: 150), I believe that legal reasoning should be able to claim a position of *relative* autonomy with respect to the political. Judicializing

2 This is in spite of some influential Northern countries' attempt of disjoining the right from its collective dimension and reduce it to another individual legal right (Bunn 2012: 109). Bunn, I. (2012) *The Right to Development and International Economic Law. Legal and Moral Dimensions*, Oxford: Hart

3 This is without prejudice of admitting the intrinsic fallibility and precariousness of democratic arrangements, as Chantal Mouffe has theorized (Mouffe 2009: 11).

politics in contrast, not only denies any legal autonomy, it also threatens de-legitimizing the legal expertise of the judiciary, arguably, one of its mayor social capitals.

Moreover, tactically speaking, I think that well-inspired-left-wing-legal-scholars have overestimated the counter-hegemonic potential of judicializing politics (Langford 2008: 42; Uprimny & García Villegas 2005: 255). Can pro-bono or NGO litigation be equated to the power of corporate law firms expending their immense resources in articulating every possible legal avenue to defending the interests of capital against state's social budget (Eberhardt & Olivet 2012)?

The points raised so far are not to deny the soundness of many judicial rulings. But even good rulings can be counterproductive if their effect is to persuade us of the idea that human rights are the stuff of expert lawyers and that ordinary citizens should not have much of a say in that process. Pushed forward by global capitalism, the great enterprise of human rights has entered a critical stage. One where what is at stake is nothing less than the extinction of human rights. Not because an authoritarian leader will ban them – sooner or later human rights find their way through that. The real challenge lies in seriously addressing the structural sources of human rights degradation by carefully evaluating the effectiveness of our legal response. In this

sense, as Jeremy Waldron (1999: 304) critically reminds us, we must overcome our fear of shaping the architecture of human rights, purely on the basis of the contempt towards legislative politics.

## Conclusion

In this essay, I have argued against the arrogance toward politics and the business-as-usual-attitude of many human rights advocates who, in contrast to the founders of the UN system, believe that human rights are not more than individual legal rights. I believe that we require both a sense of urgency, and an acknowledgment of the limitations of our legal instruments in confronting the challenges posed by global capitalism. Moving beyond the rights approach does not mean leaving legal rights behind. The accountability aim is still valuable albeit too limited in scope for coping with transnational dimensions and conceptual paradigm shifts catalysed by global capitalism. Moving beyond the rights approach entails asking what human rights could do to influence the global economy, especially how to address the structural causes of abuse and injustice derived from it. In doing so, I have suggested a strategy that requires peoples to reappropriate human rights through democracy, while restoring a truly social comprehension of social rights.

## Human rights and social justice: separate causes

*Promoting social justice is different from protecting human rights and should be separate. Social justice requires economic trade-offs through the political process. Human rights organizations are ill-suited to be effective in promoting social justice and would damage their own legitimacy by the politicization needed to be effective.*

### Introduction

The protection of human rights and the promotion of social justice are both important causes. They are also different. Though the effort to promote social justice can encompass the protection of human rights, the reverse does not seem to be true. Organized efforts to protect human rights are most likely to be effective when the focus is limited and does not embrace other important concerns such as social justice, or protection of the environment or the promotion of international peace.

A couple of definitions are in order. It is useful to think of the protection of human rights as the imposition of restraints on the exercise of state power or on the power of other institutions that have taken over the powers of the state. Restraint on power is required because each human being is entitled to certain rights that are embraced by the concepts of liberty, dignity, equality and justice. The state should not use its power to interfere with freedom of inquiry or expression. It should not deprive anyone of due process of law, or of fairness, in any proceeding that may lead to significant harm. No one should be deprived of the equal protection of the laws on the basis of race, religion, gender, or other aspects of status. The state may not engage in cruelty. It should respect a zone of privacy for all persons. In circumstances of armed conflict, the state must take all feasible measures to avoid harm to non-combatants

and those who are *hors de combat*. Certain affirmative measures – such as providing free legal representation to defendants in criminal cases who cannot afford the cost of counsel – may be needed to meet the state's obligations to place restraints on the exercise of its power. Yet carrying out such measures does not require a substantial redistribution of the resources of a society.

A characteristic of these requirements is that they take precedence over contrary concerns. Even if a speaker voices a dangerous idea or opinion, the state should be restrained from interfering. Even a person who seems obviously culpable for an horrendous crime should have the benefit of a fair proceeding to determine actual guilt. Even if it seems likely that torture would succeed in extracting crucial information, such practices should be prohibited. And so on. Human rights are not bargaining chips to be traded away when they clash with other social interests. Each person is entitled to assert her or his human rights in all circumstances and to insist that they should be honoured.

Social justice may be defined primarily as distributive justice. That is, it embraces the concept of social and economic rights but carries it to a different level. It is a vision that goes beyond assurance for every person of the minimum benefits that are required to sustain life. It is a concern that the benefits of society, such as education or health care, or the burdens of society, such as taxes, should be distributed equitably or equally. Though income inequality on a worldwide basis has declined in recent years because of the emergence from poverty of hundreds of millions of persons in such giant countries as China and India, it is growing in many Western countries. Also, the persistence of widespread extreme poverty in



many countries in other parts of the world highlights the urgency of addressing economic inequality. Yet it seems impossible to argue that contrary interests may never impose limits. Where economic issues are concerned, some balance must be maintained. The destitute should be fed, clothed, housed, educated and provided with health care without eliminating incentives for economic success and without preventing the accumulation of the capital needed for investment and innovation. Different economic circumstances at different times and places make it impossible to set a formula or establish a standard that is universally applicable. How to strike the appropriate balance is a matter that should be determined on an ongoing basis through the political process – preferably a democratic political process – in which competing interests may be considered. Indeed, this is probably the most important role of the political process in a democratic society. The political process is also the arena in which societies should determine what balance to strike between economic development and protecting the environment; and between maintaining security and promoting peace. None of these issues can be addressed usefully by asserting that only one set of considerations, such as rights, takes precedence over all other concerns. Government policies that have a substantial impact on issues such as social justice, and that involve the significant redistribution of resources, derive their legitimacy in a democratic society from their thorough consideration in the political process. If they were imposed solely on the basis of assertions of rights, they could not gain widespread acceptance.

### **Trade-offs between social justice and other concerns**

How to strike the right balance in addressing the question of social justice is a matter that has been disputed for a long time. It was debated nearly 2500 years ago, in Aristotle's day. In the *Nicomachean Ethics*, the Greek philosopher pointed out that "the cause of strife and complaints is either that people who are equal are given unequal shares or that people who are not equal are given equal shares". Many of the proponents of social justice start from the standpoint that those who are equal are given unequal shares. Indeed, where equal treatment is

denied on the basis of such criteria as race or gender, it is appropriate to address such issues on the basis of rights. An example would be the absence of municipal services such as sanitation or utilities, in a neighbourhood of a city populated by members of a racial minority. Yet probably few proponents of social justice would carry that argument to the extreme of saying that, regardless of whether there has been any showing of invidious discrimination, all must be given equal shares of all the benefits of society. They recognize that there are competing considerations. Determining where the balance is appropriate is not something that can be done by invoking rights.

To illustrate the argument that promoting social justice requires striking a balance, it may be useful to revert to the reference to the great achievements of China and India in recent years in lifting great numbers of persons out of poverty. These achievements were made possible by the industrialization that took place in these two countries. In turn, that industrialization required the production of an immense amount of energy. In both countries, but especially in China, a great deal of the energy was produced by the burning of coal. Yet, this has also had certain costs. Air pollution became an immense problem in both countries and, of course, there have been severe health consequences. The number of persons affected by heart diseases and pulmonary diseases has increased greatly, particularly in a region such as Northern China where the air pollution and water pollution are much more severe than in the Southern part of the country.

Again, from the standpoint of social justice, lifting hundreds of millions of persons out of poverty is a great achievement. On the other hand, causing severe damage to the health of large numbers of persons is a blow to social justice. It does little good to improve their ability to afford health care by means that do severe damage to their health. If one limits oneself to a concern that everybody is entitled to a level of income which will ensure that they are fed and housed adequately, can afford health care and obtain a measure of income security, what was done in China and India seems wholly admirable. By contrast, if one were to focus solely on the right to health, the effects

of industrialization in some parts of China and India are disastrous. One might argue, of course, that if China and India had industrialized using only renewable sources of energy such as solar power and wind power, the health consequences would not have been those that resulted from the use of fossil fuels. Yet it is apparent that it was only the availability of coal that made possible the tremendous industrial development that took place in those countries during the past quarter of a century. Without burning coal, many persons would have been spared deadly diseases, but great numbers now enjoying significant economic benefits would remain impoverished.

The experience of China and India demonstrates that it is often not possible to deal simultaneously with economic security and health from a rights standpoint. Yet both are essential components of social justice. What is required is striking a balance between these two concerns, each of them of crucial significance, by adopting policies that try to maximize benefits and minimize harms. It is sound policy rather than rights that should be our focus in dealing with the components of social justice.

### **Risks of conflating social justice and human rights**

One of the concerns of those wanting to keep the protection of human rights separate from the promotion of social justice is that failure to do this would subject human rights issues to the balancing that is required when addressing social justice. Where rights are at stake – such as freedom of speech or the right not to be tortured – any suggestion that a balance should be struck on the basis of competing considerations should be rejected. A closely related concern is that it should be possible to look to the courts as a component of government in which rights can be protected. The nature of courts is that they should render judgments that uphold the law regardless of political considerations. Protecting rights such as freedom of expression or equal protection of the laws is often deeply unpopular. As bodies that do not or should not consider themselves bound by the popular will, they are generally in a better position to safeguard rights than the legislative and executive branches of government. In a democratic society, the

members of the legislative branch are expected to reflect the will of the constituents they represent. The executive branch is expected to be concerned with the well-being of the whole society. Accordingly, it may be difficult for them to give primacy to the rights of a particular person whose views, or whose membership in a despised minority, are anathema to most others. Such persons often must look to the courts if their rights are to be protected.

On the other hand, courts are poorly situated to deal with issues that require political balancing. The parties that appear before them generally do not include all those whose interests may be at stake. Moreover the questions presented in a particular court case may not reflect the essential issues that are involved. Judges are not chosen for their ability to establish public policy. For all its shortcomings in particular circumstances, the best system we have devised for public policy making is the democratic political process. It should be the means through which proponents attempt to promote social justice.

Alexander Hamilton, one of the founders of the American constitutional system, famously wrote in the *Federalist Papers*, that “the executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment.” To this, it could be added that the highest calling of the judiciary is to exercise that judgment in a manner that upholds rights even while it refrains from trying to address questions that involve the sword (that is, the war-making power) or the wealth (that is, the collection or the distribution of resources) of the society. If the judiciary were to get involved in the balancing that is needed in distributing society’s wealth as a supposed means of protecting rights, it seems likely that a balancing approach would carry over to civil and political rights. The result, of course, is that civil and political rights would suffer great damage.

Another concern of many of those opposing efforts to link the protection of human rights to social justice is that states that purport to promote social justice may attempt to use this as a means of explaining away their abuses of civil and political rights. This is hardly speculative. Long ago, in the era of the Soviet Union, Moscow regularly pointed to its purported accomplishments with respect to social and economic rights as a means to counter criticism of its denials of civil liberties. More recently, a similar approach was espoused by some countries of Southeast Asia, led by the late Lee Kuan Yew, the former Prime Minister of Singapore. In our time, it is an approach followed by the current government of China. That country's success in fending off criticism of its violations of civil and political rights seems to have inspired other governments in different parts of the world to follow in its footsteps. Giving credence to such a government's claim that its economic development policies have fostered human rights by lifting a significant number of its citizens out of poverty is to do a great disservice to many millions of victims of political oppression.

### **Social justice through human rights not effective**

A contradiction that emerges in the arguments of those who want the international human rights movement to embrace the cause of social justice is that they point to an increasing number of constitutional provisions and court decisions embracing economic and social rights, and to commitments to the promotion of economic and social rights by leading human rights organizations, and at the same time they deplore the fact that this has had virtually no impact in reducing income inequality or in overcoming deprivation. This disjunction should have been anticipated. It seems more likely that the way that social justice can be promoted is by the adoption of economic policies that promote growth, as in China or India, and by political mobilization, as took place in the period subsequent to World War II in some countries of Western Europe. It is difficult to identify situations in which a rights approach had a substantial impact in promoting social justice. A rights approach has had barely any impact in addressing even the most minimal economic and social

rights. The most significant exception that comes to mind is the decision of the South African Constitutional Court in 2002 in the *Treatment Action Campaign* case invalidating that government's failure to provide nevirapine in public hospitals to prevent the transmission of HIV from mothers to their new-born children. That case became the exception that seems to prove the rule because the Mbeki government's policies with respect to prevention and treatment of HIV were bizarre, and because the cost of nevirapine was not a factor. The treatment was inexpensive and the South African government had been offered a five-year supply of nevirapine free of charge.

Though it seems appropriate to applaud the result in the *Treatment Action Campaign* case, it is difficult to imagine that the confluence of such circumstances will occur often. Accordingly, the case does not provide a foundation for those who expect that dealing with social justice from a rights standpoint will bring about significant results. With so little to show for the effort that has been made to address even minimal economic benefits through a social and economic rights approach, it seems preposterous to contend that a rights approach to social justice will have much impact. Rather, it seems possible that focusing on efforts to secure social justice by invoking rights will divert attention and energy away from the political mobilization that is required in most circumstances to be effective.

### **Why human rights organizations are not suitable for political mobilization**

Upholding civil and political rights is especially important in circumstances when the victims of abuses are resented or looked down upon by the societies in which their rights may be violated. It is essential that human rights organizations should try to offer protection to minorities such as the Roma in Eastern Europe, to the Rohingyas in Burma, and to the Pygmies in the Democratic Republic of the Congo. Human rights organizations should uphold the rights of the migrants crossing the Mediterranean to Europe and the rights of the detainees at Guantánamo. When challenging the death penalty, human rights organizations may be required to try to spare the lives of those who are widely hated because they have committed

horrendous crimes. Because they should take up such unpopular causes, human rights defenders should recognize that they are likely to be members of a minority. They are not well situated to lead struggles which are likely to depend on political mobilization of large constituencies. Such mobilization as does occasionally take place on human rights issues tends to be effective because of the moral clarity of the issues that are addressed. The opportunity of human rights advocates to prevail in the causes they espouse depends on their adherence to moral norms, such as those embodied in the prohibition of torture, that are codified in legal precepts that have gained wide acceptance.

Because political mobilization is generally required to advance social justice, those individuals and organizations leading such a struggle have to be concerned with their own capacity to win public support. Their effectiveness in political mobilization may be impaired by their identification with unpopular causes such as the fairness of legal proceedings for terrorism suspects. For this reason, human rights organizations that defend the rights of all, including even the most marginalized or despised members of society, are probably not in a good position to be public advocates of social justice. If they were to take on a leadership role in such struggles, some organizations might be tempted to avoid cases in which defending the rights of the unpopular would undercut their effectiveness in political mobilization. If that were to happen, of course, the impact on the protection of civil and political rights would run counter to the rationale for the formation of such organizations. On such grounds alone, it seems best to separate the effort to protect human rights from the promotion of social justice. Combining the two concerns is unlikely to serve the interests of social justice and is potentially harmful to the protection of human rights.

### **The dangers of a politicized human rights movement**

A final reason for maintaining a separation is that some governments have engaged in the extensive redistribution of resources and, therefore, may make a credible claim to be promoting social justice. An example of such a

government that has held on to power for an extended period is Cuba under the Castro brothers. The Cuban government has provided its citizens with such benefits as education and health care for all and has done much better than many other governments in promoting income equality. At the same time, however, it has engaged in severe abuses of human rights. In the more than a half century that the Castro brothers have held power, there has been almost complete denial of freedom of expression. In the early years of Fidel Castro's ascendancy, many thousands of peaceful dissenters were imprisoned and a few thousand were executed. Over time, the number of those imprisoned for such reasons declined greatly, but mainly because dissent was largely wiped out.

Cuba is just one country that could be cited to illustrate the point that the protection of human rights and the promotion of social justice do not necessarily go hand in hand. That poses a danger that a politicized human rights movement – and it would have to be politicized to be effective in promoting social justice – could become an apologist for governments that engage in gross abuses of human rights.

The fact that some proponents of social justice would like to see international human rights organizations take on the role of a political movement on behalf of their cause suggests that those organizations enjoy public credibility that might make them effective in that role. If human rights organizations such as Amnesty International and Human Rights Watch have such credibility, however, it is because, by and large, they are seen as defenders of civil and political rights. Amnesty International, which was founded at a relatively early point during the cold war, and Human Rights Watch which was also established during the cold war but at a somewhat later point, established their bona fides by criticizing the states aligned with the Soviet Union, the states aligned with the United States and non-aligned states in accordance with the same standards. They acquired their reputations by documenting such civil and political rights abuses as attacks on dissenters, torture, the persecution of ethnic minorities, and the use of rape as a weapon of war, and advocating on behalf of the victims. Any deviation from political neutrality will be quickly noted

and used by the targets of their criticism to detract from their legitimacy. Converting them into lobbies focused on national budgets, taxes and corporate profits would be a distortion of their mission and a disservice to the cause of human rights.

## Against a human rights-based approach to social justice

*Human rights activists are increasingly expanding human rights advocacy into the realm of social justice. Yet there is no evidence that an increased judicialization of economic, social and cultural rights delivers better outcomes when it comes to health, education and living standards. Moreover, a brief survey of Amnesty International's reporting on a number of countries shows an overwhelming focus on an abuse-based approach favouring civil and political rights. These findings suggest that a human rights-based approach to social justice is misguided and that human rights activists should resist such a scope creep in their mission.*

### Introduction

Increasingly the quest for social justice has become interwoven with human rights discourse and advocacy. Since the mid-nineties, the United Nations Human Rights Council (and its predecessor the Commission on Human Rights) has established a number of thematic special procedure mandates related to social justice. These include one on extreme poverty and human rights, which states that:

“The elimination of extreme poverty should thus not be seen as a question of charity, but as a pressing human rights issue. Its persistence in countries that can afford to eliminate it amounts to a clear violation of fundamental human rights.”<sup>1</sup>

1 See statement of the Special Rapporteur on extreme poverty and human rights on the website of the Office of the High Commissioner for Human Rights (OHCHR) (date unknown): <http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx>

Amnesty International's annual report from 2010 emphasizes that:

“Increased accountability for the denial of basic economic, social and cultural rights has become ever more important in view of the combined effects of the food, energy, and financial crises which are estimated to have pushed many million more people into poverty. The respect for all human rights, including economic, social and cultural rights, must be an integral part of all national and international responses to the crises.”<sup>2</sup>

The pursuit of social justice through human rights fits well with one of the central tenets of international human rights, namely the ‘Indivisibility’ of all human rights as affirmed by the Vienna Declaration at the 1993 World Conference on human rights. The concept of indivisibility was particularly aimed at improving the standing of economic, social and cultural rights (ESCR), long the poor relation of civil and political rights (CPR) despite their inclusion in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

One of the impediments to indivisibility has been the perception that social and economic rights are not justiciable, meaning that they cannot be enforced as individual rights in the same manner as CPR. This perception has been challenged in recent decades as ever

2 Amnesty International (2010), *Amnesty International Report 2010: The state of the world's human rights*, London: Amnesty International Publications. Available at: <https://www.amnesty.org/en/documents/pol10/001/2010/en/>

more states adopted and enforced social and economic rights in their constitutions, as has been the case in South Africa, Brazil, Colombia and elsewhere.

The EU Charter on Fundamental Rights also includes a number of social and economic rights, which can be invoked before the European Court of Justice. Several decisions by the European Court of Human Rights and the Inter-American Court of Human rights have blurred the lines between CPR and social and economic rights.<sup>3</sup> The most striking development at the international level was the entry into force of the Optional Protocol to the ICESCR in 2013, which allows for individual complaints against ratifying states, prompting former UN High Commissioner for Human Rights Navi Pillay to state in 2007 that “an optional protocol would help reinforce social justice as a value of the international community”.<sup>4</sup>

Understandably, proponents of indivisibility and social justice have trumpeted this development as evidence that it is perfectly possible to enforce social and economic rights as individual rights, just as is the case with freedom of expression, fair trial etc. And while not all sceptics of justiciability have been swayed, this development has certainly introduced a much less abstract element into the ongoing discussion.

### **The limited effectiveness of judicializing social rights**

Yet while social and economic rights are increasingly being judicialized, very little research has been dedicated to the actual effects of constitutionalizing social rights; in other words does the judicialization of social and economic rights deliver the goods promised by their wording? Do enforceable

social and economic rights deliver social justice? This is a crucial question because despite the heated nature of the debate over social rights, the real question is not whether health, education and adequate living standards are supremely important goods essential for human flourishing, but whether these goods are apt to be realized through the matrix of (justiciable) human rights.

Human rights organizations, in other words, when deciding on whether to dedicate more of their already scarce resources towards the pursuit of social justice, should take into account whether their expertise based on the framework of human rights is likely to help advance the plight of the poor. The absence of robust research prompted this author and Danish economist Christian Bjørnskov to examine this question in-depth. We did so by surveying the constitutions of 188 countries and identifying those states that included social rights in their constitutions (75 at the time of the survey) as well as those countries in which these rights had been made justiciable (37).<sup>5</sup>

Doing so allowed us to build a unique dataset covering the years between 1960 and 2010, where we traced the constitutional status of three main social rights: the right to health, education and social security (which are also protected at the international level in the ICESCR). By statistically comparing the evolution of health, education and relative income differences across countries that have or have not introduced social rights (taking into account a wide range of factors such as national income, democracy and regime type) our findings suggest that the introduction of social and economic rights do not, in general, have robustly positive effects on the population’s long-term social development. We, for example, find no effects of health rights on immunization rates or life expectancy, regardless of whether they are justiciable or not. Even more surprising, we found that the legalization of economic and social rights had a strongly negative medium-term effect

3 See for instance the European Court of Human rights case, *Kjartan Ásmundsson v. Iceland*, 12 October 2004 (App. No. 60669/00), and the Inter-American Court of Human rights Case, *Children’s rehabilitation vs. Paraguay* 2 September 2004, [Ser. C] No. 112.

4 OHCHR (2007) ‘High Commissioner backs work on mechanisms to consider complaints of breaches of economic, social and cultural rights’, Geneva, 16 July. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6155&LangID=E>

5 A working paper is available here: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2323539](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323539). An updated version is forthcoming in *The American Journal of Political Science*.

on education, as well as a robustly negative medium-term increase of inflation and detrimental effects of the right to health on child mortality.

Why does the legalization of economic and social rights have negative consequences? Our hypothesis is that the introduction of these new rights cause disruptions, most of which are borne by those already in the education system, and by those least likely to have access to the legal and political system, i.e., the poor. Since the rights do not give governments or private actors more resources, what is likely to occur is simply that governments reallocate scarce resources towards those more likely to claim their newly given rights, whether they are individuals or identifiable groups.<sup>6</sup> Of course, one can point to people whose lives have been saved by courts ordering expensive treatments, as has happened in Colombia, or people escaping abject poverty based on a right to a certain level of income. But these individual examples obscure our study's broader, macro-level findings.

One might object to such a seemingly cold and calculated 'spreadsheet approach' to human rights, and insist that the individual's human rights should not be subjected to a utilitarian calculus. But in the domain of social rights, one can only do this by turning a blind eye to the effects on real people that are not immediately apparent from the numbers and graphs of our study. The Colombian courts may have saved the lives of a few, but we must ask ourselves: how many died, or were forced to live with a disease that could have been cured, because of resources diverted from them to others who were lucky enough to have access to a good lawyer?

And what about the people whose access to education, housing or social security is affected by the diversion of funds to health, or vice versa, depending on the outcome of cases that appear before courts in no particular order? By definition, resources are scarce, and governments must prioritize. This sits uneasily with the notion of human rights

as a 'trump card' taking priority over other considerations. So while the constitutionalization of social and economic rights has been a victory for human rights activists, it is not clear that it has done very much for the people who were supposed to benefit. These findings are in line with studies on the efficacy of international human rights conventions that generally find very little relation between ratification and improvement (across the whole board of rights) and even less so when it comes to social rights (Hafner-Burton 2013: 79).

It is true that the provision of civil and political rights is not cost-free and also involves priorities and trade-offs. An independent and well-educated judiciary, a civil service committed to the rule of impersonal laws rather than clientelism and corruption, prisons free from torture and a police force protecting the people rather than a regime are all goods that require means. But the level of resources needed to realize social rights are far higher than those needed to ensure a basic system of justice. Moreover, the core content of a number of fundamental freedoms, the absence of censorship, torture, arbitrary arrests and wilful killings, can be achieved by even very poor countries. For instance abolishing censorship does not require significant resources and in most instances the enjoyment of freedom of expression, privacy etc. does not affect other citizens' ability to do the same.

### The Danish case

When looking at the relationship between social rights and social justice it is interesting to take the case of Denmark, a well-functioning liberal democracy that combines universal welfare with a deeply entrenched commitment to the rule of law and civil liberties (though a certain erosion of civil liberties has been apparent since the turn of the millennium). Denmark commits some 57 per cent of its GDP to government spending, 32 per cent to social protection, but merely 0,9 per cent to its courts, police, prisons and prosecution services.<sup>7</sup> It is also interesting that with a few

<sup>6</sup> Ibid.

<sup>7</sup> Data retrieved from Statistics Denmark: [www.statistikbanken.dk/OFF29](http://www.statistikbanken.dk/OFF29) and [www.statistikbanken.dk/UDG11](http://www.statistikbanken.dk/UDG11).



minor exceptions, the Danish constitution does not protect social rights. Moreover, both center-right and center-left governments have rejected incorporating human rights conventions with social and economic rights into national law, whereas the European Convention on Human Rights has played an ever more important part in Danish law since 1992, ensuring a stronger protection of, *inter alia*, press freedom, private and family life, and against arbitrary deprivations of liberty. During the adoption of the Optional Protocol to the ICESCR, the Danish government explicitly rejected ratification thereof:

“Denmark firmly believes that the majority of the rights in the ICESCR is insufficiently judiciable and therefore less suited to form the basis of an individual complaints mechanism. Moreover, due to the vague and broad nature of the rights in the covenant, Denmark fears that there is a serious risk that the Committee on Economic, Social and Cultural Rights will end up both functioning as a legislator in the area of economic, social and cultural rights and determining the allocation of state parties’ resources within this sphere. Denmark finds both scenarios unacceptable, as we place great importance on the fact that the allocation of resources within the economic, social and cultural sphere is a national matter, which is the responsibility and prerogative of national, democratic institutions with direct, popular legitimacy.<sup>8</sup>”

The Danish position demonstrates that a rejection of justiciable social and economic rights does not necessarily entail a rejection of the underlying ideal of social justice based on a universalist welfare state, and that in fact the divisibility of human rights is perfectly compatible with the achievement of this ideal. The Danish welfare state has been built and maintained by various governments with different ideological positions. Some of these governments have sometimes felt compelled to adopt reforms such as increasing the retirement age, lowering and limiting accessibility to certain benefits, slashing spending on

vulnerable groups and numerous other pragmatic policies that are difficult to square with a human rights-based approach to social justice. What has been crucial for the development of the welfare state, however, has been the ability for civil society and mass movements to mobilize public support that would ultimately crystallize into political power.

This struggle for a social welfare state was intimately interwoven with the fight for civil and political rights, as the founding members of the Danish labour movement were frequently arrested, imprisoned, harassed and sent into exile in the late 19<sup>th</sup> century, due to their political views which were regarded as seditious (Engberg 1975). Accordingly, the first manifesto of the Danish Social Democratic Party demanded: “The abolishment of all press laws, association- and assembly laws, and all other laws whereby a People can be restricted from manifesting its thoughts in word and writing”.<sup>9</sup> Only when these basic freedoms were ensured were its members able to create the platform that would catapult that movement into power, making the Social Democratic Party the most successful party in Danish political history, measured by the number of terms in power.

### **Limited usefulness of legalizing economic and social rights to pursue social justice**

The difficulties of applying a human rights approach to social justice in practice, rather than in mere rhetoric, is also demonstrated by an, admittedly, brief and non-exhaustive, overview of Amnesty’s actual reporting on twenty countries from 2005–2015. The overview focuses on ten ‘Global Players’ (US, UK, France, Brazil, Russia, China, South Africa, Argentina, India and Saudi Arabia) and the ten least developed countries in the world (Congo, Niger, Mozambique, Chad, Burkina Faso, Mali, Eritrea, Central African Republic, Guinea and Burundi).

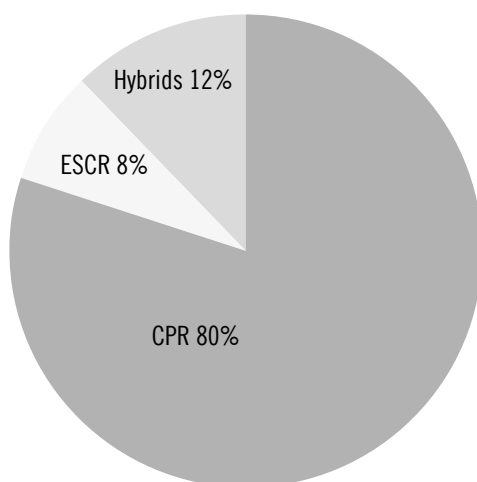
8 Explanation of Position of Denmark at the 63th session of the United Nations General Assembly, 16 September 2008.

9 The ‘Gimle programme’, paragraph 4 adopted on 6–8 June 1976. Available (in Danish) at [http://www.historiefaget.dk/typo3temp/tx\\_cliopdfprint/KildeopgaveomSocialdemokratiet\\_685002\\_jesp476b.pdf](http://www.historiefaget.dk/typo3temp/tx_cliopdfprint/KildeopgaveomSocialdemokratiet_685002_jesp476b.pdf)

The brief overview suggests that Amnesty continues to prioritize work on classic civil and political rights: 80 per cent of the rights violations identified in Amnesty's reports on what I label 'Global Players' related to civil and political rights, 12 per cent related to 'hybrid rights' (such as rights of migrants that include both elements of CPR and social and economic rights) and a mere 8 per cent of the rights identified were social and economic rights. For the least developed states the corresponding numbers were 86, 10 and 4 per cent respectively.

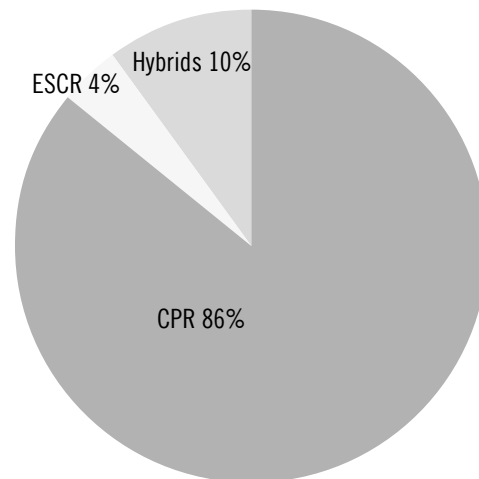
Even when the reports focus on social and economic rights, the criticism is often aimed at abuses (such as forced evictions and discrimination), rather than more general criticisms of economic policy or fiscal priorities such as the lack of provisions of public goods such as housing, jobs or social security. While these findings are only indicative and should be followed up by a more comprehensive study, they strongly suggest that Amnesty's country-specific research overwhelmingly reflects an 'abuse-based approach', that naturally favours a predominant, but not exclusive, focus on CPR, that protect individuals against such readily identifiable abuses by state authorities.

#### Global players



*Table 1: Rights violations mentioned in Amnesty's annual reports (2005-2015) for US, UK, France, Brazil, Russia, China, South Africa, Argentina, India and Saudi Arabia*

#### Least developed countries



*Table 2: Rights violations mentioned in Amnesty's annual reports (2005-2015) for Congo, Niger, Mozambique, Chad, Burkina Faso, Mali, Eritrea, Central African Republic, Guinea and Burundi*

Amnesty's apparent bias towards CPR, it is submitted, reflects that when moving from rhetoric to concrete action, social justice is an elusive concept that cannot be neatly captured by the limited and simplistic language and framework of human rights. Questions of social justice are infinitely more complicated and complex than instances of censorship, torture or arbitrary arrests that can readily be identified as human rights abuses. There is no set and agreed upon universal formula for alleviating poverty, and in democracies political parties and the electorate will have legitimate differences of opinion on how to achieve social justice and how to resolve the inevitable trade-offs and priorities involved in matters of economic and social policy.

Amnesty's approach thus seems to prove right veteran human rights defender (and contributor to this essay volume) Aryeh Neier (2013), who recently argued against social justice, insisting instead that:

"Human rights, in my understanding of the concept, are a series of limits on the exercise of power. The state and those holding the power of states are forbidden to interfere with freedom of inquiry or expression. They may not deprive anyone of liberty

arbitrarily. They are prohibited from denying each person the right to count equally and to obtain the equal protection of the laws. They are denied the power to inflict cruelty. And they must respect a zone of privacy.”

### **The way forward**

The lesson of these findings is not that we should be indifferent to the plight of the poor or abandon the quest for social justice, but rather that human rights are a blunt and ineffective instrument for alleviating poverty, or securing access to health and education. Human rights can help shine a light on, and remedy, instances of clear abuse, including in the economic and social domain such as large-scale forced evictions, policies of deliberate food deprivation (think North Korea and Ethiopia), or discrimination in access to health and education. They cannot, however, deal efficiently with the complexities of general policies on health, education and poverty.

However, it would be mistaken to conclude that turning our backs on a rights-based approach to health, education and poverty also means turning our backs on the sick, illiterate and poor. It is not that these goods are any less important than free speech or the prohibition against torture. But the inherent complexity of these goods makes human rights ill-suited to provide them for those in need.

What the human rights movement has succeeded spectacularly in, is to provide the basic framework that allow those in civil society who care about poverty, health and education to campaign, disseminate ideas, hold political leaders accountable and ultimately achieve political change. As such, human rights activists help provide the platform for social justice activists, who can then use their skills and expertise campaigning for their vision of the good global society. But by using ‘human rights’ to solve other vital policy questions, those who care most about the poor may actually be making things worse.

## Will human rights help us get social justice?

*Will human rights help us get social justice? Since the world in recent years has been shaken by protests, this question is on the minds of activists. But is it on the agendas of human rights institutions? This essay looks at contradictions between human rights and social justice frameworks and offers perspectives on possible synergies.*

### Introduction

Is the pursuit of human rights an effective way to achieve social justice? This important question is on the minds of forward-looking activists. After all, in recent years the world has been shaken by protests demanding real democracy and justice for socioeconomic grievances. Research I have been involved with on protests and political participation has examined the grievances and demands expressed in almost nine hundred protests between 2006-2013 in countries representing more than 90 per cent of world population and encompassing a wide spectrum of governments, from centralized, authoritarian regimes to democracies, both old and new (Ortiz et al. 2013, Burke, 2014). Protests against antisocial economic policies and for meaningful democracy topped the findings (See Fig. 1). These protests came in many forms: the violent (riots for safe and affordable food, water and fuel), the traditional (campaigns to reform public services and pensions, create good jobs and better labour conditions, enact progressive taxation and fiscal spending, undertake land reform), and the innovative (mass occupations of civic spaces demanding regime change and the elimination of inequality).

While a number of protests framed grievances as at least partly rights-based, the majority, and especially those aimed at changing the economic system and its policies, have not pursued their aims in terms of human rights

mechanisms, but instead with direct demands in the streets and on the Internet for better wages, good and affordable housing, fuel, transportation, education, health care, food, water and other needs. In addition to numerous practical demands on the economic system, many of these protests also voice overarching grievances against that very system, and in particular its production and reproduction of debt and inequality. Social movements for economic justice have demanded real democracy alongside almost every economic demand, recognizing that without meaningful political participation they will not have a say in the economic decisions that affect their lives. Without a system of meaningful political representation, there is little incentive for them to undertake the difficult process of legal redress because the very governments that carry out antisocial economic policies are the same ones entrusted with guaranteeing rights, and this would often have to be done against the wishes of powerful private interests. Consequently, not only those living in poverty, but even the middle classes increasingly take direct action for economic justice. If we are interested in learning how to achieve social justice in everyday life and not only in norms, we should grapple with this wave of direct action and what it says about the relationship between formal human rights and social justice.

### Conditions for social justice

The dominant approaches to human rights from the fields of law and political science emphasize formal legal mechanisms and norms embodied in the system of sovereign states and voluntary institutions of international cooperation, beginning with the United Nations and including its various agencies, committees and regional bodies. Legal experts in these institutions write the human

rights laws, treaties, charters and conventions and diplomats in governments negotiate them. It is then up to national states – on the presumption that they are the legitimate bodies to mediate and regulate citizen's affairs – to guarantee and enforce them. The problem is, efforts to realize specific human rights are frequently propelled by social movements in opposition to the very states charged with safeguarding rights, often with powerful private interests in the background. In such a scenario, social justice remains elusive.

The term 'justice' appears just once in the Universal Declaration of Human Rights, in the preamble, where it is deemed – along with freedom and peace – to be the foundation of human dignity and equal rights. Contemporary debates about global justice begin with John Rawls' *A theory of justice*, which assumes the existence of a market economy and takes as given the possibility for stable economic equilibria in a capitalist system (Rawls 1971). In a critique and extension of Rawls' theory, Thomas Pogge argues that global justice must be understood as social justice, meaning it is an assessment of the social impact of institutions and rules rather than a judgement of individual behaviour (Pogge 2010). To assess the conditions and prospects for social justice we need to ask whether the system and institutions presently in place are providing – or are capable of providing – social justice for the world's people. Pogge claims the current global institutional arrangements actually cause harm because they perpetuate rules whose foreseeable and avoidable results produce poverty and result in the deaths of innocent people (Pogge 2002). This claim is bolstered by the heterodox economic literature – from Epstein and Axtell's computational, agent-based "Sugarscape" models to Duménil and Lévy's analysis of the rise of finance within neoliberal arrangements – which challenges notions that a deregulated, profit-based economic system, embedded in a complex society, can reliably produce a stable economic order (Epstein & Axtell 1996; Duménil & Lévy 2011). Indeed, falling wages and shrinking pensions in many countries have led to decades of rising inequalities and fewer opportunities for decent work and full engagement in society, especially for youth. Protests against economic policies in recent years have

been most numerous in relation to subsidies, especially threats to remove food or fuel subsidies, although a great number also relate to labour compensation and safety regulations in the workplace, to taxes and financial regulation, and to fiscal and social security policies (Burke 2014). Chief among the institutional targets of these protests are the International Monetary Fund and European Central Bank, widely perceived as the chief architects and advocates of fiscal austerity since 2010. Societal targets include corporations and elites, including the financial sector, whose privilege and influence they widely denounce (Ortiz et al. 2013).

A number of scholars have noted that while the human rights framework has near universal acceptance by states, those very states – especially powerful ones like the US, Russia and China – have poor rates of compliance with international law. A political economy of human rights that analyses rights violations under economic neoliberalism can offer some explanation why this is so. Viewing human rights as a dynamic field of social struggle rather than a static, legal construct, a critical perspective reveals that globalization since the 1970s has produced a deep restructuring of the international economic system in line with the needs of powerful corporate actors, resulting in vastly increased financialization and rising income and wealth disparities (Duménil & Lévy 2011; Stiglitz 2012). The influence that international economic restructuring has had on the field of human rights should not be underestimated. In their book, *Human rights enterprise*, critical sociologists Armaline, Glasberg and Purkayastha (2015: 72) argue that the process of actually realizing human rights is a dialectic between formal mechanisms and movements, acting not only against violations by the state but also by the private sector: "[H]uman rights violations resulting from the Great Recession were not simply or even primarily violations by the state ... but rather violations prompted by private economic actors (corporations) alone and in concert with or enabled by the state and its policymaking power." Can human rights be effective against such adversaries when their economic interests are on the line? Advancing an analysis of the political economy against the ideology of economic

orthodoxy – with its imperatives that take on the patina of natural law: to prioritize growth, deregulate, maintain low debt-to-GDP ratios, and uphold the rights of creditors and the privileges of private interests in the global and national economies.

### **The connection between human rights and social justice**

Despite the fact that human rights and social justice have similar goals, since both advance a critical/aspirational vision for a better world based upon peace and justice, there are numerous problems with framing the link between them as causal, implying that human rights is a language, or mechanism, for achieving social justice. First of all, in spite of the principle that all human rights are indivisible and interdependent, the human rights field does not have a unified approach. Progress in civil and political rights, the so-called ‘first-generation’ human rights, such as rights to assembly, speech and religion, is based upon monitoring the presence or absence of negative outcomes like wrongful incarceration and censorship (OHCHR 2012). Determining whether civil or political rights have been violated is a relatively unambiguous process compared to making that determination with regard to economic, social and cultural rights, the ‘second-generation’ of human rights. Second-generation rights are seen in the dominant framework as following the first in progressive realization over time. In the case of economic rights in particular, the indicators of progress can be exceedingly technical – the antithesis of language used by protesters demanding economic justice – and its practitioners, embedded in and therefore inevitably prone to blind spots in their analysis of the very institutions, policies and practices that make up their work.

The historical roots of this bifurcated vision of human rights lie in the cold war. Early on in the development of human rights principles and instruments, sharp disagreements arose between the United States and the Soviet Union. The US promoted as human rights the very political rights enshrined in the US constitution and by liberal democracy, such as the right to vote and freedom of speech and religion, whereas the Soviet Union promoted social and economic rights central to a socialist organization

of society, such as the rights to health care, work and education (Posner 2014). The historical disagreement over the relationship between rights and justice is reflected today in the contradictory perspectives on social and economic institutions held by the activists for human rights and social justice, on the one hand – let’s call them *participatistas* – and the institutional representatives of human rights bodies and organizations – *institutionalists* – on the other hand (Heller 2012).

Unlike institutionalists, participatistas value the ‘expertise’ of life-experience over technical mastery, which gives them greater legitimacy to voice the grievances and aspirations of social movements than institutional representatives, who are unable to account for the historical lack of progress in achieving universal human rights. Coming from decentralized groups of citizens, non-citizens, even whole communities with shared grievances, activists operate in a political space more liquid than the system of sovereign states and international organizations. While they do sometimes petition nation states and intergovernmental bodies, they also embrace direct action within and across borders and in confrontation with non-state actors to attain social justice. Recent examples include the Summer of Rights in Brazil (2013), Istanbul’s Right to the City movement around Gezi Park in Turkey (2013), the Pro-Democracy movement in Hong Kong (2014), and Black Lives Matter, opposing structural violence against black men in the United States (2014–15). Influential human rights groups walk a fine line with regard to their ‘street credibility’ among such activists, and their perceived legitimacy rises and falls to the degree that these actors are predominantly seen supporting activism or being fixtures in the apparatus of human rights.

Since 2001, the World Social Forum, the quintessential vision of international social movements in action, has proclaimed “another world is possible”. But ‘no justice, no peace’ has emerged as the means for extracting accountability from individual governments, international financial institutions, powerful corporations, and even the system as a whole. Activists for human rights and social justice do not necessarily accept the need for a capitalist market economy – although the international system on

which human rights is built takes that as a given. Those who allow for a market or mixed economy assume it has to be regulated and supervised to produce socially just outcomes. Since orthodox economics promotes imperatives like the need for economic growth, for deep involvement of the private sector in development, and for discounting the social outcomes of increased financialization, it also remains unchallenged in the dominant discourse on human rights. It is therefore necessary to take a different approach to link with social movements, which have long attributed economic injustice to the concentration of corporate power and the inequality it generates. Rather than an externality or aberration, it is seen as a logical outcome of the way a global, capitalist economy works.

### **Rights + riots: toward synergy?**

In November 2014 I had the opportunity to organize a workshop with strategists from social and political movements, social and political scientists in academia, and government representatives and their advisers on internal and external conflicts and democratic dialogue. All were invited because of their work on protests or protest movements; all were appreciated for speaking their minds on several occasions in which the discussion became heated. The idea we wrestled with in the workshop can be summed up in the following question: “Is this phenomenon in the streets a protest to express aspirations, grievances and demands, or is it conflict to be managed or subdued?” Because the agency of the one considering the question strongly conditions the answer, we were largely in agreement that institutional frameworks for conflict resolution and democratic dialogue often answer differently than protesters themselves. The framework for institutions presupposed external agents – experts – who managed episodes of protest in order to achieve a state of security and stability. The case for protesters, and those of us in the meeting with one foot in an institution and one in the streets, was different. We discussed how protesters act as ‘experts’ on their own behalf and for the transformation of their own reality, even in the case of riots and violent protests, which can be understood as expressions of injustice and demands for its reversal (Burke 2014).

The Institute of Development Studies (IDS) in the UK, along with academic and activist partners in India and Africa, completed a fascinating report in late 2014 on “Food Riots and Food Rights” which Naomi Hossain presented at the workshop (Hossain et al. 2014). The two-year study on which the report was based started by looking at the year 2007, when global food prices began to rise sharply after having been low for twenty to thirty years, and ended in 2012, a six-year period that produced a number of food-related struggles around the world. On average food prices have been high ever since 2007, and volatile, provoking riots linked to higher food prices in more than thirty countries. The IDS research was in part a response to media and academic bias in the coverage and analysis of food protests. An interesting revelation provided by the political event-catalogues compiled by the research team from local, national and international newspapers was that food riots almost always happened *somewhere else*. In other words, the Indian press found food riots in Bangladesh, Pakistan and Nepal, but none in India. Or when the international press reported food riots in Bangladesh, none were noted in the Bangladeshi press, and so on. They found that both journalists and researchers tended either to focus in an unbalanced way on the violence associated with the riots or to vilify the protesters and caricature their demands. The problem with this, as the report’s lead author Naomi Hossain (2015) put it: “People don’t just go out and riot because prices are high and they want the government to do something. They do it because they think they have some moral justification.” During this time period there was also a growing global movement on the right to food, so in addition to analysing the different ideas, ideologies, motivations and meanings of the riots, researchers wanted to compare the two phenomena. Riots are ostensibly spontaneous, violent and unruly, while the right to food movement uses legal instruments and more polite civil-society discourse, but both have an ethical and moral underpinning.

Their findings showed that these episodes of struggle to secure basic economic goods – especially food and water – are almost always going on around what historians call the ‘politics of provision’, but are only visible when

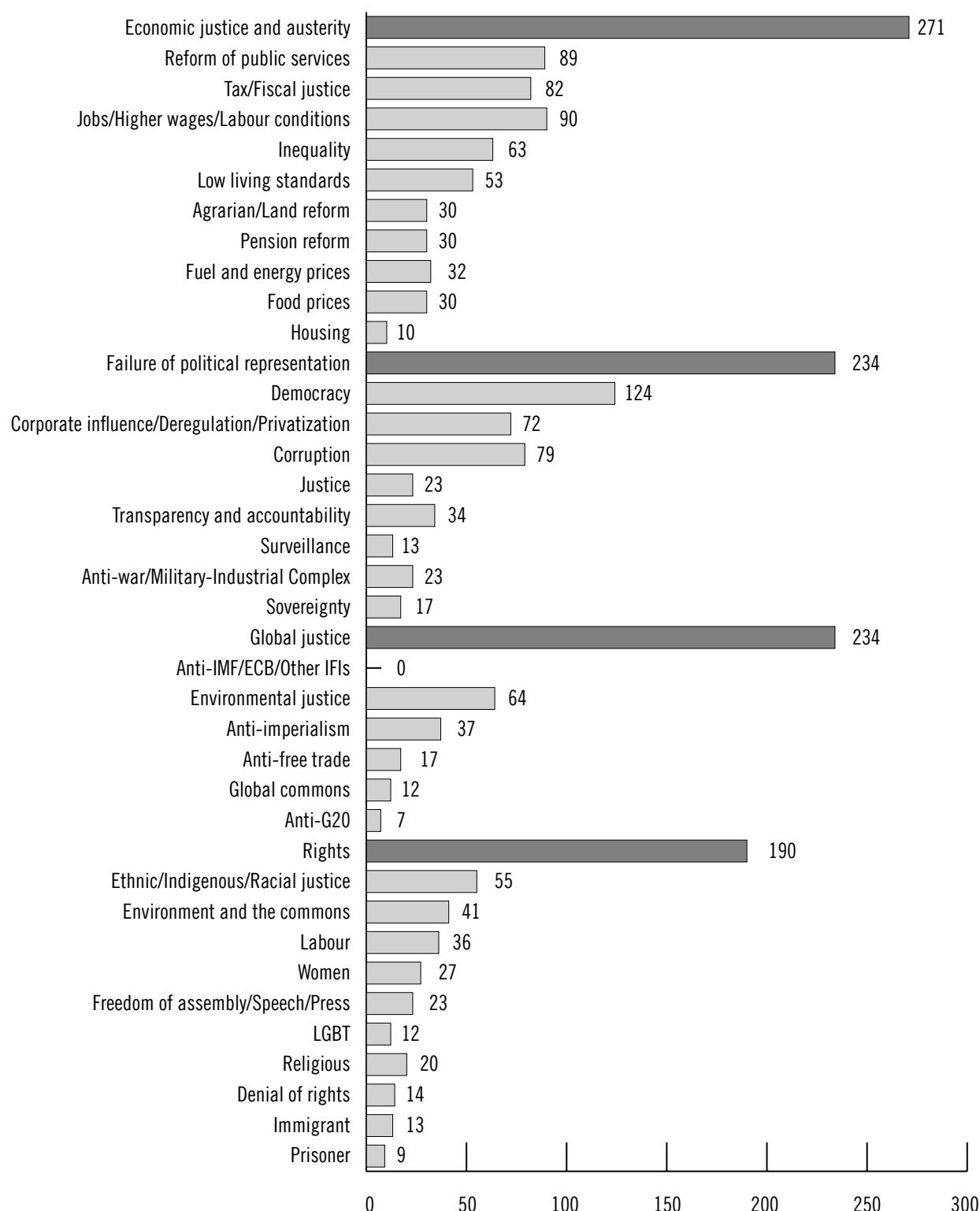
there are protests. Protests invoke the ‘moral economy’, a common, strongly-felt sense that states are ultimately responsible for protecting the right to fundamental needs like food, however that ‘right’ is conceived, since it is not only in the legal but also in the moral sense that this is a shared expectation. The study revealed that during a food price spike, people share an understanding that the system is unfair and rigged in favour of the biggest market participants, so the government must come in to protect ordinary people. Because of this, while demands advanced in the heat of a food riot may not be sophisticated or articulate, they nevertheless communicate the grievance well enough to get action from governments. This was one of the surprising outcomes of the study: that riots work. But if rioting is seen as a way to hold governments accountable for a morally charged issue like hunger and food security, what role do, can, and should human rights play?

### **A new agenda for human rights institutions?**

Since the economic crisis of 2007–2008, social movements have significantly shifted the discourse on social justice issues: consider the effect the Occupy movement had on the public discussion of inequality. Better synergy between the institutions of human rights and activists would require a deeper shift of discourse, something able to be translated into new institutional designs. According to sociologist Patrick Heller, who also participated in the workshop on protest and conflict, this is what European social democracy forged during decades of working-class mobilization, war and revolutionary moments, resulting in an institutionalized but fairly effective welfare state (Heller 2015).

Clearly the present situation – especially for developing countries – does not mirror the historical/political setting of Europe in this era of worker-led struggles, so the process to create new and reformed institutions would be different, but it would benefit from the cooperation of the institutions of human rights and activists in social movements. Heller offers a view of how such collaboration might look via the experience of the *Sanitaristas*, a contentious, grassroots movement of doctors and nurses in Brazil who set out to penetrate state institutions in order to solve the seemingly intractable problem of health care delivery in their country. Through their participatory process and militancy, they were able to establish universal primary health care, a goal that still eludes the US (Heller 2013). This experience shows that movements can scale up their work and create new institutions for the provision of social justice, but to do so they need platforms for action and organization, which the larger movement for participatory governance in Brazil since the end of authoritarian rule in 1985 provided. This is also where the human rights movement can play a critical role in helping movements to achieve social justice in everyday life, by challenging the global human rights regime, especially big NGOs and the intergovernmental bodies for human rights, to attune their agendas to the issues from the streets. Institutional change will require a new era, beyond representation for those whose rights are denied, and toward the creation of more democratic platforms, in which people and communities speak for themselves.



**Figure 1: Grievances and demands driving world protests, 2006-2013**

Source: Author's own graph of data from the 2014 research and update to data set conducted by Burke S., M. Berrada, V. Rubio, Y. Cai, A. Heisig, originally compiled by Ortiz, I., S. Burke, M. Berrada & H. Cortes (2013) as analysed in 'World Protests 2006-2013', Initiative for Policy Dialogue and Friedrich-Ebert-Stiftung New York.

## How are social justice and human rights related? Four traps to avoid

*How are social justice and human rights related? I share reflections on the cooperation between FIAN International, as a human rights organization, and social justice movements. I draw attention to four traps, how human rights can be misunderstood or misused and then serve as obstacles to social justice. Moreover I suggest some directions to how human rights organizations can overcome such obstacles to pursue social justice.*

### **The struggle for agrarian reform as a struggle for social justice and human rights**

A classical social justice issue has been redistributive agrarian reform – at least in the world of the peasants and landless people. Some of the first cases of FIAN International back in 1986, when this human rights organization was founded, dealt with landless peasants in Brazil struggling for agrarian reform through occupation of large vacant estates. Agrarian reform can be seen as an emblematic social justice policy: Overcoming an unacceptable distribution of productive resources and control in the hands of the few – and addressing an unsustainable mode of production. How can a human rights organization work for agrarian reform – and how can it relate to the social movements that are the protagonists in the related land struggles?

In Brazil the Landless Peasants' Movement – in order to speed up the Brazilian government's agrarian reform programme – had developed a method of "ocupar-resistir-produzir": (i) Identifying an idle estate fulfilling the criteria for expropriation in the context of the agrarian reform programme, occupying this estate with a large number of peasant families, successfully; (ii) resisting attempts of

the landlords/speculators and their paramilitary forces (or sometimes the police) to regain control over the estate; and (iii) starting to produce food on the estate. These cases raised human rights issues across the board – from economic and social rights to civil rights and the right to property (see below – Trap 4).

In 1996 La Via Campesina (LVC) and FIAN International launched a joint Global Campaign for Agrarian Reform. LVC and FIAN have been two rather unequal partners. LVC is a coalition of mass-based organizations of peasants and other rural people – meanwhile the biggest rural social movement in the world. FIAN International is a medium size membership based human rights organization – with no ambition to organize the affected people as social movements do. As a human rights organization, FIAN International has been using the concept of human rights and – as far as possible – human rights law (and fora) to address cases in a large variety of contexts where and when the right to adequate food gets violated. Moreover, FIAN has been involved in bringing about new instruments related to the human right to adequate food (the Optional Protocol to the ICESCR, the FAO Right to Food Guidelines, the FAO Tenure Guidelines).

How has FIAN been working with human rights in the context of agrarian reform? The answer to this question is reflected in a wealth of literature that you will find on [www.fian.org](http://www.fian.org) searching for 'agrarian reform'. In a nutshell: FIAN looked at the human right to adequate food always in the sense of the interrelatedness of all human rights – holistically. The term 'right to feed oneself' was coined by FIAN as a combination of the rights to adequate food and freedom from hunger (art.

11 ICESCR) and the right to earn one's living by freely chosen work (art. 6 ICESCR). Aspects of the right to health (art. 12 ICESCR) (with a view to unhealthy industry food) was also brought to bear for agrarian reform. So was sustainability as non-discrimination of future generations (in line with art. 2(2) ICESCR). People's right to self-determination was brought in from art. 1 of the ICESCR to underline that food dependency undermines peoples' self-determination. FIAN has been emphasizing the rights of women – agrarian reform must not mean patriarchal forms of traditional European peasant agriculture. FIAN drew from the mentioned human rights its analysis of the states' obligations for the cases at hand. FIAN used not only international law, but also obligations of Brazil in national law along with evidence why agrarian reform measures are an obligatory policy for Brazil.

FIAN did its human rights advocacy mainly in the 'resistir' part of the movement's strategy. These were situations of conflict where human rights and constitutional rights were important both in the political struggles and in the negotiations between the peasants and the state. Besides defending the civil rights of persecuted peasant activists, FIAN provided human rights arguments that allowed to judge whether state policies and measures in these agrarian reform conflicts were appropriate or not. The fact that such analysis of human rights law came from an international organization without a direct stake in these conflicts added to the strength of these arguments.

FIAN is not a solidarity organization, but a human rights organization. It cooperates with La Via Campesina and other movements, because FIAN believes that they address key issues from its mandate and are involved in conflicts that are relevant for the realization of human rights. I am inclined to consider social movements as some sort of human rights organizations in a broad sense – at least to the extent that these movements base their struggle not (alone) on the legitimate interests of their constituencies, but on human rights values. Human rights organizations in the narrow sense, like FIAN or Habitat International Coalition (HIC), for example, are organizations that seek to develop and implement human rights law and contribute to

its enforcement and thereby contribute – in this example – to the advancement of the human right to adequate food or housing. Social justice movements and human rights organizations are complementary.

FIAN's basic solidarity with oppressed groups is not put in question by the fact that FIAN does not support all their demands. The call for the resignation of an agrarian reform minister, for example, would be a demand that FIAN would not necessarily support. Not because FIAN considers such demands unjustified, but because it may have no human rights law argument to support these demands in the case at hand.

The crucial issue with human rights advocacy in social justice contexts is to identify states' obligations in human rights that support demands of the social movements at this moment. The states' obligation to reform agrarian systems so that they provide an adequate standard of living for local populations while at the same time ensuring that people can earn their living in dignity, can be derived from the ICESCR and supports landless peasants' demands for land and suitable agrarian policies. When demands get very specific, however, in a concrete case of land occupation or agrarian reform legislation, the problem can be in the details. Human rights are no mechanism that can replace political discussion, public debate and parliament. States do have a considerable 'level of discretion', in particular in their obligations to fulfil, for example around agrarian reform. This level of discretion has its limits. Human rights provide a 'corridor' for agrarian policies; if agrarian policies imply that large parts of the rural population are without land, and without work in dignity, such policies breach states' obligations under human rights.

Human rights organizations in the field of social justice do 'advocacy' with human rights. Like all 'advocates' they are not meant to be impartial – they are not judges. Human rights organizations use human rights and human rights law to serve the cause of the oppressed groups and persons they cooperate with – and in this manner advance the realization of human rights. Investors sometimes also use human rights arguments – mostly related to the human right to property.

Making an analysis of the related human rights obligations of states can be of value for social movements to advance their cause – for example when it comes to the expropriations of a large estate. Landowners can fight such expropriations usually before the courts. Courts have to interpret national law with a view to the international (and national) human rights obligations of their state – where the human right to property of the landowner could stand against the human right to an adequate standard of living of the landless peasants. If the case makes it to the Supreme Court, this can be crucial. This legal background has its parallels in the political struggles going on in the media and in negotiations. Judges and movements can benefit from arguments that clarify the states' obligations linked to the human rights of landless peasants.

As a social movement, LVC struggles on the basis of its own concepts, strategies and demands growing out of the experience of its members, its internal political and policy debates, and the needs of the hour. The key concept developed by LVC is food sovereignty. It includes the human right to adequate food, but only as one of several elements. Human rights are important for LVC, but not the main plank of its struggles.

Human right advocacy has to shape up in order to improve its value for the struggle for social justice. I address a few problematic developments in the human rights community that can hamper the efficiency of human rights and the work of human rights organizations. These developments pose traps for social movements, and for human rights themselves.

### Trap 1: Depolitization

Human rights legitimize, instruct and limit the powers of the state. They are highly political and give rise to fundamental questions about society. Human rights organizations should be open to such debates as long as human rights provide the key terms of reference. What is essential about human rights is primarily not the right, but the related states' obligations. If states breach their related obligations beyond a certain threshold, they have forgone their legitimacy and are ripe for revolution (or secession). These were essentially the arguments of the revolutionary

human rights documents of the 18<sup>th</sup> century in France (and America). The Preamble of the 1948 Universal Declaration of Human Rights retains that: "... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that humans rights should be protected by the rule of law." Human rights – as criteria for legitimacy of states – are superior to states. Therefore state-made law (positive law) – be it through constitution, national legislation or international treaty – is at best a means to protect human rights, but does not generate them.

Human rights are constitutional for setting up a legitimate state – and for replacing a state by a new one, if it turns illegitimate. Human rights are meant to ensure that states meet the related obligations. This implies that human rights obligations are to be enforced, hence they are law.<sup>1</sup> As human rights are law, but not positive law, and they are superior to positive law, human rights obligations are 'supra-positive law' with human rights inherent in people. The related philosophical, spiritual and religious questions are interesting, but beyond the scope of this essay. Moreover, we should recall that it was not the philosophers, or lawyers for that matter, who were vital for putting human rights on the political agenda. It was political activists, people like Lafayette, Jefferson, Paine. Economic, social and cultural human rights in particular have to re-enter the political agendas. And for this to occur, human rights organizations should move such debates forward. Portraying human rights as non-political misses the point, both conceptually and historically. This can turn social justice movements away from human rights.

<sup>1</sup> In a first approximation, law consists of rules that should be enforced (while moral duties do not). A legal obligation linked to a right should not only be enforced, but provide for mechanisms for rights-holders to enforce them. Therefore it is already clear from the observation that morals are built on duties and that 'moral rights' is a self-contradicting term.

## Trap 2: Mistaking human rights law for human rights

Another reason why social movements may have doubts about making human rights the main plank of their struggles has to do with the fact that human rights organizations and human rights lawyers very often refer to positive law – the law made by states. Undernourished landless peasants in front of fences that excluded them from vast stretches of idle lands in the hands of an absentee landlord do not feel they need the state to tell them what their human rights are – and whether they have a right to land to feed themselves or not. The constant reference of human rights organizations and lawyers to human rights law (treaties, legislation, mechanisms etc.) can create the false impression that human rights were granted or agreed by states. In reality the key feature of human rights is that they are ‘supra-positive’ law – i.e. law that is *not* made by states, but emanates from the people and has to shape the state. Human rights law is positive law meant to make states’ human rights obligations (in the sense of supra-positive law) enforceable through legal mechanisms. In this process a written interpretation of human rights (human rights law) can facilitate the work of judges, police and administration. These interpretations under human rights law can be incomplete, biased or misleading. Even parliamentary states can fail to properly implement human rights in positive law – and/or to enforce the related law. This is a painful experience of many social justice movements.

It is not unusual that human rights are identified with human rights law. Such identification coincides with an ideological position that sees only positive law as law. Legal positivism is a deadly threat for human rights themselves. As legal positivism claims that there is no law beyond positive law, it claims that there is no supra-positive law. It therefore claims that there are no human rights – or that human rights are only ‘language’ and the related states’ obligations only moral.

## Trap 3: Reducing rights to morals

Social justice includes the full realization of economic, social and cultural rights. One of the standard attacks

by privileged elites on these human rights has been to avoid taking them seriously as rights, and see them only as morally laudable aspirations: The idea that the poor landless peasants should have access to ‘excess lands’ is shared even by the Brazilian upper landowning class. The landlords would certainly agree to some moral duty of the state to provide such access. (In fact, one reaction of the Brazilian government to the landless peasants’ call for land redistribution was to set up colonization programmes for them in the Amazon.) The landlords had great difficulty understanding that their own land was ‘excess land’ and that Brazil had a legal obligation to expropriate and (re) distribute. The landlords saw ‘their’ right to property as law – as something that needs to get enforced. When the Brazilian state advanced its agrarian reform policies, the landlords organized rural militia to exercise force to protect their property, where the state did not exercise it. On the contrary, the exercise of force against landlords resisting agrarian reform has been very rare, even though such use of force would have been legitimate to protect a human right. It surely makes a difference whether a state action is a moral duty or a legal obligation.

Unfortunately, the human rights community itself contributes to the undermining of human rights as rights. The term human right is a homonym – one word with two meanings. It describes both the object of the human right, also called the human rights value (say – access to adequate food), and the right itself (the totality of all state obligations related to access to adequate food and to the mechanisms for the rights-holder to obtain remedy in case these obligations are breached). Human rights obligations are binding rules for states to avoid and prevent harm to human rights values (respect- and protect-obligations) and to put an end to deficiencies in human rights values (via fulfil-obligations).<sup>2</sup> In normal language we use human rights both for the human rights values and for the right itself. We can go on using human rights as a homonym, but we should know what we are

<sup>2</sup> These obligations being rules entails that human rights obligations can be breached even if no damage will be incurred or maintained in a specific case.

doing: When are we talking about a right and when about a value?

A violation of a human right is a breach of a human rights obligation. A violation is therefore always an act or omission by a state – not a situation of deficiency in a human rights value. Nevertheless a deficient human rights value is sometimes called a violation of human rights. Hunger, for example, indicates a deficient human rights value (lacking freedom from hunger), but is not necessarily a human rights violation. Of course, hunger can be the result of violations (and very often is), but sometimes even the best governments in the world will be unable to prevent hunger. Then there is no human rights violation involved here. The identification of a violation therefore requires an analysis of state obligations and action or inaction in the respective case – a political and legal analysis. This, however, is what social justice movements (and human rights organizations) have to do anyways.

As a consequence of using ‘human right’ where ‘human rights value’ is meant, ‘violation’ is used, where ‘deficiency’ of a human rights value is meant. With this language, human rights violations ‘lead to’ violations. This is not only confusing, but counterproductive, as it trivializes human rights and distracts from the real issue: An analysis of states’ breaches of obligations – and how these obligations can be enforced by the rights holder. Otherwise we are not talking any longer about rights and law, but about morals in a ‘rights language’. Human rights, however, are not a language to talk about something that could also be talked about in different terms (social justice, ‘development’, ethics etc.). Reducing rights (in particular the underdeveloped economic, social and cultural rights) to a language on morals, plays in the hands of socially oppressive elites.

#### **Trap 4: Misusing the human right to property**

Previous sections already touched upon the use – or rather misuse – of the human right to property as an obstacle to social justice. The right to property does not seem to be very prominent as a human right. It was not even included in the international human rights covenants of 1966, even though it was mentioned in the Universal Declaration.

Nevertheless, the right to property has become one of the best implemented human rights in positive law – at least when it comes to the protection of rich people’s formalized property. Property is not an absolute value, but receives its legitimacy and its limits from its usefulness for the other ‘absolute’ human rights values such as access to food and water, physical integrity, political participation etc. Accordingly, property can be dealt with very differently in different societies. The capitalist concept of property is just one mode of property – and its coherence with absolute human rights values remains questionable.

States are duty-bound by human rights obligations to respect, protect and fulfil the right to property as long as it is coherent with absolute human rights values. What is all too often overlooked is the States’ human rights obligation to fulfil poor people’s access to property, in particular property to feed themselves, to house themselves, to enjoy an adequate standard of living, and to participate in the political life of their communities. Agrarian reform in Brazil could be seen as a fulfilment programme under the right to property for landless peasants.

The human right to property with its biased interpretation has been one of the reasons why considerable parts of the socialist movement have been remained skeptical about human rights and their positive role in promoting social justice.

#### **Conclusion**

Economic, social and cultural human rights provide a legal framework for states obligations on social justice issues. Social justice needs to get institutionalized and this requires properly functioning states and their cooperation, based on human rights.

Human rights are of considerable value for social (justice) movements: When confronting states’ authorities, they also confront their interpretations of law. In such situations it helps to point to states’ human rights obligations, codified or not, for example concerning the validity or legitimacy of certain policy measures or interventions in areas of social justice. Using human rights is not ‘legalistic’ – even

though human rights are rights in law not in 'language'. Human rights can be an important element to strengthen the position of a struggling movement.

A number of traps, such as depolitization, legal positivism, moralization, and a misunderstood right to property can be important obstacles for social justice and the effectiveness of human rights. Human rights organizations and social justice movements should be aware of these traps.

Human rights organizations engaging in social justice issues should clearly see their role and limitations.

They can provide advocacy and advance human rights law and the implementation of human rights, but must never speak in the name of affected people or social movements.

Each human rights organization stands for all human rights, even if it has – for practical purposes – only a limited mandate. The indivisibility of human rights translates into the indivisibility of human rights discourses. The related political debates should therefore be a matter of interest for all human rights organizations.

## Justice over rights?

*Over time, Amnesty International has increasingly used social justice language and methods in its work on social and economic rights. Should social justice, the fair distribution of wealth, resources and power, become its goal? And what are the potentials and pitfalls of different approaches to social justice?*

### Introduction

In 2009, the then Secretary General of Amnesty International wrote: “[b]illions of people are suffering from insecurity, injustice and indignity. This is a human rights crisis... The world needs a different kind of leadership, a different kind of politics as well as economics – something that works for all and not just for a favoured few” (Khan 2009a: 5). In her essay, the opening contribution to Amnesty’s annual report in 2009, Irene Khan disapproved strongly of “the collusion between business and state to deprive people of their land and natural resources and impoverish them” (ibid: 8). Although the essay was not particularly clear about the nature of the changes Khan was advocating, human rights were certainly a central part of them. In a press release rich in eschatological language (“the world is sitting on a social, political and economic time bomb”) that accompanied Amnesty’s annual report, the Secretary General warned that “the world needs a new global deal on human rights – not paper promises”, after which she called on the US to ratify the International Covenant on Economic, Social and Cultural Rights, and on China to ratify the International Covenant on Civil and Political Rights (Amnesty International 2009). Khan might have been convinced of the need for radical changes to the economic and political structures of the world, but for the moment Amnesty had little that was revolutionary or, for that matter, even reformist to offer.

Although Amnesty has been working for more than a decade on economic, social and cultural rights (ESCR), we believe that Khan’s call for structural political and economic changes is a far cry from the minimalistic, anti-utopian anti-politics that is characteristic of much of the human rights activism since the 1970s (Moyn 2010). Regardless of whether one supports or disagrees with the idea that Amnesty should start tackling the root causes of human rights abuse and engaging with distributive questions, assuming that social justice issues and human rights are one and the same thing ignores some of the conceptual and strategic differences between both concepts, which are described by other authors in this volume (see in particular the essays of Sara Burke, Dan Chong, Jacob Mchangama, Samuel Moyn and Aryeh Neier).

In this essay, we will show that, over time, Amnesty has tended to ‘delegalize’ human rights discourse, seemingly preferring a moral and increasingly political understanding of human rights over a strictly legal approach. The organization has also adopted new methods that focus on the empowerment and participation of rights holders, a move that correlates with an increasing interest in social justice through its work on social and economic rights. We will argue that if Amnesty chooses to work more progressively on social justice issues, it needs to take account of and openly discuss the trade-offs and consequences of such a decision – as well as of a decision not to do so. We end the essay by sketching four possible approaches to social justice, describing in broad outlines the potential and pitfalls of each approach.



## Amnesty and social justice language and methods

For a long time, leading international human rights organizations prioritized civil and political rights over ESCR. Social justice groups and local rights groups have equally long pushed them to start working on poverty, economic inequality and access to services. During the late 1980s and the 1990s, international human rights organizations started to respond to these calls by expanding their mandates to include ESCR. During the same period, a rights-based approach to development became popular within certain social justice and humanitarian organizations. Consequently, strategies and methods used by social justice and human rights groups have merged over time (Bob 2008; Nelson & Dorsey 2007). The alter-globalization movement and the human rights movement, however, have largely moved in parallel circuits and continue to view each other with mutual scepticism (Glasius 2012).

More recently, human rights groups have made it their priority to forge links with social movements and grassroots groups in their work on ESCR. Amnesty International is an interesting case in point. Its official vision and mission make it an archetypical human rights organization, while its stated strategy of grassroots activism, participatory processes, and its current 'move closer to the ground' suggest a resemblance with social justice groups.

In preparation for the 28<sup>th</sup> International Council Meeting (ICM) in 2007, the International Executive Committee of Amnesty distributed a circular entitled 'From adoption to agency'.<sup>1</sup> The document signals a fundamental reorientation of the organization towards rights holders, who were no longer 'adopted' as 'victims' of human rights violations but seen as agents shaping their own future. Amnesty would not only work *for* but also *with* rights

holders in order to keep pace with changes in human rights activism and in line with its aspirations to build a greater constituency in the Global South and East by moving closer to the ground.<sup>2</sup>

Two years later, in 2009, Amnesty launched its global 'Demand Dignity' campaign. The aim of this campaign was to make ESCR a reality. It presented poverty and exclusion as human rights issues. Empowerment of the poor was considered as being key to break the vicious circle of poverty, and therefore Amnesty started emphasizing the need to enhance participation of rights holders in its strategies. In her book, *The unheard truth. Poverty and human rights* (Khan 2009b), published as part of the campaign launch, Secretary General Irene Khan advocated using human rights to challenge the system of (social) injustice. She promoted the end of 'voicelessness'. Participatory and empowerment approaches are now clearly embedded in Amnesty's activism and campaigning strategies.

In preparation of subsequent International Council Meetings, it has been suggested within Amnesty to adopt social justice as one of the values that the organization should work for, alongside other values such as human dignity and equality.<sup>3</sup> Although up until now Amnesty has chosen not to change its mission, the fight against socioeconomic inequality and poverty has regularly been articulated as being a core human rights concern for the organization in both internal and public documents.

Preceding a UN meeting on the post-2015 Development Framework, Amnesty released a joint statement together with more than 350 other organizations. In 'Human rights

1 Amnesty International, 'From adoption to agency. Preparing Amnesty to be a healthy 50 year old, 28th International Council Meeting Circular 41'. Internal document. The International Council, composed of representatives of national sections and structures of the organization, is the highest decision-making body within Amnesty International.

2 See: <http://www.amnesty.ie/content/moving-closer-ground>. See also blog by AI's Secretary General Salil Shetty (2015), 'Moving Amnesty closer to the ground is necessary, not simple', *openGlobalRights*, 20 January. Available at: <https://www.opendemocracy.net/openglobalrights/salil-shetty/moving-amnesty-closer-to-ground-is-necessary-not-simple>

3 As evidenced by internal documents distributed by the International Secretariat (IS) to national Amnesty sections and structures in preparation of Amnesty's Strategic Plan 2010-2016.

for all post-2015' it is suggested that a certain measure of equality is a condition for human rights. According to the signatories of the statement,<sup>4</sup> their vision of the preferred post-2015 framework is one that:

"Eliminates all forms of discrimination and diminishes inequalities, including socioeconomic inequalities. Human rights can only be realized within socio-economic and environmental boundaries if we also reduce inequalities of wealth, power and resources."

In 2013 a vacancy announcement for posts of directors of Amnesty's new regional offices in Africa and Asia listed among the job requirements that the ideal candidate ought to be "personally engaged with human rights *and social justice*" [italics DL & LvT].<sup>5</sup>

Amnesty International is present at important venues where social justice groups gather to confront economic globalization, such as the World Social Forum (WSF) and the G8 alternative summits. The WSF rejects a representative role, and it makes no recommendations or formal statements on behalf of participants.<sup>6</sup> Nonetheless, it does require that participants adopt a general opposition to neoliberal globalization and a commitment to nonviolent struggle. The first article of the WSF 'Charter of Principles' specifies the aims of the WSF in the following words:

"The World Social Forum is an open meeting place for reflective thinking, democratic debate of ideas, formulation of proposals, free exchange of experiences and interlinking for effective action, by groups and movements of civil society *that are opposed to neo-*

*liberalism and to domination of the world by capital and any form of imperialism* [italics DL & LvT], and are committed to building a planetary society directed towards fruitful relationships among Mankind and between it and the Earth."<sup>7</sup>

Amnesty International has participated in the WSF since 2003, as well as in the World Economic Forum at Davos itself. It uses the forums to build partnerships and to campaign in collaboration with other grassroots organizations on specific human rights issues. Ten years later, Amnesty still uses the summits to place human rights on the agenda, but now also expresses its concern about inequality and related economic policy. In a press release issued around Davos 2012,<sup>8</sup> Amnesty's Secretary General Salil Shetty was quoted as follows:

"Business and political leaders need to recognize the need for a new approach that is fair and inclusive. Instead of entrenching the divide between rich and poor, they need to adopt growth plans that address this divide. They must place people's rights at the heart of any solutions. Otherwise, the recent social unrest unfolding in countries across the world could only be the beginning."

In a more recent blog posted at the start of the regional World Economic Forum in Mexico in May 2015, Shetty wrote that (income) inequality is a source of many human rights problems in the Latin American continent, which is "home to 10 of the 15 most unequal countries in the world (...). Tackling inequality with sustained concrete action is the only way for the region to truly move forward."<sup>9</sup>

4 Joint statement (2013), 'Human rights for all post-2015', 10 December, was endorsed by over 350 organizations from across the world. Available at: [http://www.cesr.org/article.php?id=1532\\_](http://www.cesr.org/article.php?id=1532_)

5 The vacancy was posted at: <https://careers.amnesty.org>.

6 See the WSF 'Charter of Principles' which states that: "The meetings of the World Social Forum do not deliberate on behalf of the World Social Forum as a body. No-one, therefore, will be authorized, on behalf of any of the editions of the Forum, to express positions claiming to be those of all its participants..." (Article 6)

7 'The Charter of Principles', *World Social Forum India*, published in 2006. Available at: <http://www.wsfindia.org/?q=node/3>.

8 Amnesty International (2012) 'Davos: World leaders protecting business over rights in economic crisis', *Amnesty International news*, 24 January. Available at: <http://www.amnesty.org/en/news/davos-world-leaders-protecting-business-over-rights-economic-crisis-2012-01-24>.

9 Shetty, S. (2015) 'The business of human rights in the America's: no money, no justice', *Amnesty International blogs*, 6 May. Available at: <https://www.amnesty.org/en/>

In their campaigning, staff members of local Amnesty sections likewise suggest that the organization strives for the reduction of inequality, and for many other values. In a speech delivered on the occasion of the 2013 Lough Erne G8 summit, Patrick Corrigan of Amnesty United Kingdom stated:

“This is our message – we want a world without war, without repression, without environmental degradation. We want a world without poverty, without hunger, without the inequality which divides us. The G8 leaders say they want free trade. We say we want fair trade and free speech. The G8 leaders say they want globalization of business. We say we want to globalize peace and globalize justice. They say they want to tinker with the tax havens. We say we want a world where no longer will 800 million people go to bed hungry every night and where every 5 seconds a child dies from extreme poverty.”<sup>10</sup>

### Different approaches to human rights

These examples demonstrate that increasingly Amnesty International understands human rights as a tool for attaining social justice. This points to a related but hardly debated or articulated difference of opinion within the human rights community itself. Human rights can be seen as an *instrument* for attaining higher goals, or as a *goal* in and of themselves. In an instrumental view of human rights, other goals or values like social justice may take priority over these rights.

In this process, the gap between Amnesty’s statutory mission (human rights for all as its end goal) and its practices seems to be growing while at the same time its understanding of human rights seems to be changing from a legal to a moral one, interchangeable with broad notions of justice, dignity and equality and more or less detached from the international legal standards embedded in treaties, laws, and declarations.

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latest/news/2015/05/the-business-of-human-rights-in-the-americas-no-money-no-justice/.

10 Corrigan, P. (2013) ‘G8 must put rights at hearts of decisions’, Amnesty International UK blogs, 17 January. Available at: <http://www.amnesty.org.uk/blogs/belfast-and-beyond/g8-must-put-rights-heart-decisions>.

The above examples also demonstrate a third possible relationship between human rights and social justice, in addition to the *instrumental* and *end goal* approaches to human rights. In this third, *conditional* understanding of human rights, only a certain measure of inequality in the distribution of other goods is deemed compatible with the realization of human rights. It suggests that human rights are only compatible with limited differences in income, capital or wealth.

What the instrumental and conditional approach to human rights have in common is an emphasis on the political character of human rights. Political in the sense that human rights are seen as prescribing a single appropriate set of guidelines for political or economic policy, even though these find only weak support in international human rights law. This all brings Amnesty much closer to being an organization or movement that engages in public policymaking processes, by advocating for or against particular political or economic arrangements to realize justice or for the allocation of resources to certain policies (e.g. welfare and health) at the expense of others (e.g. military and defence).

Some would argue that Amnesty’s original power was its non-partisan character, putting people’s basic rights first, whatever the political or economic system under which they lived and regardless of the ideology of the perpetrators of human rights violations and abuses. They might claim that the organization should refrain from providing opinions on resource allocation and policy prioritization, because this may take it into the terrain of the executive or other public policy makers and disregard that states have a considerable “level of discretion” in their human rights obligations.

Others would contend that the more Amnesty moves into discourses around scarce resource trade-offs and distributive justice, the less comfortable a strictly legal rights language – framed as politically neutral – becomes. They argue that a pursuit for social justice eventually requires a more outspoken stance on particular economic arrangements and a revision of dominant notions of impartiality (see, for instance, Saiz 2009: 287). They

might claim that the organization's work will ultimately be ineffective to help realize the enjoyment of rights by the most marginalized and deprived if it does not get engaged in economic, political and cultural debates and offer system-oriented solutions.

### **Trade-offs and choices for Amnesty International**

What are the potential and pitfalls of adopting a broad, moral understanding of human rights or seeing them as political instruments to promote social justice for an organization like Amnesty International?

Adopting social justice language allows groups to circumvent the indeterminacies in international human rights law on issues of distributive justice (see Chong 2010). It will help draw attention to the structural and historical causes and processes underlying inequality and injustice, including relationships of power. It opens up possibilities to come up with solutions not dictated by international law, including localized interventions that, according to some, will have more concrete results for individuals and groups.

It also allows Amnesty to get (more) involved in political debates about resource redistribution, and to overcome frustrations that the specialized debates of human rights practitioners about the interpretation of legal texts obscure the larger moral and ideological issues at stake. This can enhance its role in developing an effective response to the challenge of social and economic inequality within and between states and the impact of fiscal and economic policy on human rights enjoyment.

From a strategic point of view, social justice language has the potential to resonate among large segments of the population, particularly poor and marginalized groups (see Sara Burke's essay in this volume). Social justice language is less technical, more accessible and more politically malleable than human rights language. This offers potential to organizations like Amnesty International to rally new activists, supporters and members, find new donors and build new partnerships and alliances with deprived groups and individuals.

There are also potential pitfalls when human rights are equated with or instrumentalized for social justice, or when the realization of human rights is regarded as being conditional on a just distribution of goods, wealth and power. By detaching human rights from the international legal instruments in which they are anchored, there will be a much wider range of possible interpretations of what they mean, what their corresponding duties are and who the duty-bearers are. Because values like human dignity or social justice are broad and vague, they can be interpreted in many different and possibly contradictory ways. The analytical rigour and discipline of the dominant legal approach will get lost, and with it a specific kind of authority that the ostensible objectivity and authority of law brings with it.

Engaging with social justice can also create tension between Amnesty's emphasis on impartiality on the one hand and the pressure to take a stance on the alleged underlying causes of human rights violations on the other. Amnesty may no longer be considered independent or impartial if it starts denouncing certain political or economic systems or commits to anti-neoliberal agendas. This may undermine its credibility and legitimacy, particularly among the political elites that it aims to influence and among some of its donors.

Finally, moving *too* close to the ground may result in Amnesty associating itself with agendas that are not necessarily aimed at furthering human rights. Amnesty's emphasis on empowering marginal groups presumes that they will use their power to defend human rights. But the values and aspirations of local grassroots groups and movements may actually be different from those of Amnesty, and their preferred methods to challenge the system perceived as unjust may be more radical, even violent, than Amnesty can afford.

### **Four approaches to social justice**

We want to conclude by briefly sketching four theoretical, broad and partly overlapping approaches to social justice, each of which has different implications for Amnesty's strategies. For the sake of argument we chose clear, short

and provocative names for these approaches: 'Justice over rights'; 'Justice through rights'; 'Rights over justice'; and 'Justice for rights'.

### ***Justice over rights***

In this approach, Amnesty International adopts social justice as at least part of its mission and develops a position on what this entails in terms of policies and campaigning. Amnesty will probably strive for a more ambitious egalitarian agenda than its current economic and social rights agenda, and consequently will, if legalistic strategies do not suffice, develop non-rights-based policies and strategies to attain social justice.

In this approach, realizing human rights for all is not the (only) end goal of the organization. Human rights are instruments for reaching a different, possibly higher goal, notably distributional or even substantive equality, and not merely goals in and of themselves.

In the *Justice over rights* approach, Amnesty will probably work with a (broad) moral concept of human rights to circumvent the limitations and indeterminacies of law, but also with other values such as dignity, justice and equality. The flexibility that this might entail will be beneficial for its work with rights-holders and with other movements and activists. Social justice issues might thereby invigorate Amnesty's campaigning and mobilization capacities.

A *Justice over rights* approach might be less beneficial for the consistency and coherence of policies and practices. Due to its more politically outspoken and confrontational nature, it may also alienate some supporters in those parts of the world where Amnesty traditionally has a strong presence, who have found Amnesty's profile attractive because of its ostensibly non-political or non-partisan character.

### ***Justice through rights***

In this approach, Amnesty International contributes to attaining social justice insofar as realizing human rights contributes to it. Its campaigning for social justice is limited by widely shared interpretations of legal human rights

obligations and duties. It monitors compliance of states with their international legal obligations in relation to ESCR and develops the appropriate methods for doing so.

In this approach, human rights are the legal framework within which other values, such as social justice or dignity, are promoted. Amnesty views human rights law as a framework that guides the design of economic and social policy(making) and narrows the range of policy options a state may pursue. However, when realizing human rights does not suffice to attain other values, Amnesty is silent.

This approach would imply continuity in Amnesty's mission in at least those parts of the world where the organization traditionally has a strong presence, and hence ensures its activism and income base. It also signals a development in Amnesty's thinking and practices related to inequality and poverty which might attract new audiences.

At the same time, in using social justice language for what is, in the end, a more limited rights agenda, Amnesty risks disappointing activists seeking radical systemic changes to reduce the gap between the rich and poor. It might paralyse rather than stimulate Amnesty's campaigning when the organization tries to cater to both revolutionary activists and moderate supporters with divergent expectations.

### ***Rights over justice***

In a *Rights over justice* approach, Amnesty also works from a legal notion of human rights but only aims for the realization of human rights for all, not for other values such as social justice or dignity. It monitors states' compliance with their international legal human rights obligations and conceptualizes equality in a procedural sense, notably: people deserve equal protection under the law and equal protection against discrimination in their access to services.

Amnesty tends to avoid debates about the creation and distribution of wealth necessary to fulfil rights, believing that these involve choices that belong more to the political

community rather than to the realm of law. However, Amnesty will emphasize people's rights to participation and information to ensure transparency in public decision-making and the inclusion of affected groups in social and economic policy deliberations.

In this approach, Amnesty risks being viewed as typically 'Western' and thus harming its perception of impartiality in the Global South and East. This approach will not resonate with, and probably disappoint, marginalized or needy rights-holders and groups aimed at transforming the economic and political system.

However, by continuing to fulfil its watchdog function, Amnesty can remain an important protector for social justice activists. It can continue to advocate for their rights to freedom of expression and peaceful assembly or access to justice and remedy, and to monitor human rights compliance by law enforcement agencies in demonstrations by social justice activists. Amnesty's critical distance from these movements' redistributive claims ensures an independence and neutrality that enhances its credibility among the policy elites it engages and its recognizability among traditional constituencies.

### ***Justice for rights***

A *Justice for rights* approach emphasizes that realizing human rights, which continues to be the end goal, presupposes a certain measure of social justice. In this approach, large differences in income, wealth and primary goods are considered to be incompatible with the full

realization of human rights, hence Amnesty would not only plead for a minimal floor of basic rights, but also adhere to the idea that there is a maximum ceiling of inequality that the realization of human rights can afford.

Making a meaningful contribution to this debate might presuppose that Amnesty formulates how much inequality is compatible with realizing human rights or that Amnesty has at least an internally agreed and externally convincing method or standard to decide this issue, whether in general or in specific situations.

### **Conclusion**

This essay illustrates that there are indications that preferences and tendencies exist within Amnesty International to expand its mission to include social justice as a goal, just as there is probably a broad movement that opposes this move. While not taking a position in this debate, we have discussed some challenges that the organization needs to confront and openly discuss when it does change its mission according to these lines. We've described four theoretical ideal-type approaches to social justice that the organization could follow. In reality, Amnesty is internally heterogeneous and already moves back and forth between these different approaches with one being dominant over others at different times or different places. Considering the internal and external pressure on Amnesty to engage with persistent inequality and related political and economic system flaws, it might be time to bring these internal contestations to the fore and choose a direction the movement can agree on.



## Advancing social justice through human rights: the experience of Amnesty International

*A legal approach to economic, social and cultural rights (ESCR) not only allows, but in fact requires significant changes in the distribution of rights and resources within and between societies. Amnesty's work on ESCR has thus far addressed only some of the necessary changes. This was a transitional step and Amnesty's ESCR work is steadily moving in the direction of applying human rights law to grapple with issues of resource distribution. This essay discusses what Amnesty will need to do to succeed in this area and why it may not be able to fully satisfy all social justice advocates.*

### Introduction

As with all of its human rights work, in its work on economic, social and cultural rights (ESCR), Amnesty has focused on ensuring accountability for both state and non-state actors based on the relevant international human rights frameworks. It has called for new standards where necessary to achieve the objectives set out in the Universal Declaration of Human Rights (UDHR) and international human rights treaties. This framework guides and limits the extent to which Amnesty can advance social justice claims and in this respect it is not surprising that the words 'social justice' did not feature when Amnesty elaborated its aims for engaging on ESCR.<sup>2</sup> The Amnesty framework also requires strict adherence to impartiality rather than seeking, or (perhaps more crucially)

being perceived to advance, a particular political or economic agenda, or both.

Amnesty's approach aligns with that of the UN Committee on Economic, Social and Cultural Rights, which has stated that: "[I]n terms of political and economic systems the Covenant [on Economic, Social and Cultural Rights] is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach."<sup>3</sup> This is not to say, however, that a government has *carte blanche* in regard to the covenant's interpretation, only that it may have to adjust policies and practices to meet its duties under the treaty, rather than their ideological underpinning.

In this essay, we are not addressing how Amnesty would work on social justice per se, but rather how its work on ESCR can help achieve many, although not all, aspects of social justice. For example, Amnesty calls for provision of essential services for all to realize rights such as those to education and health, and for continually improving them over time. Such provision normally requires a net redistribution of resources from upper-income groups to lower-income groups through taxation and, in regard to low-income countries, through changes to national and international regulation, taxation and, in regard to low-income countries, through international assistance. In

1 This essay represents the personal views of the authors and does not necessarily represent the views of all colleagues at Amnesty. We thank Avner Gidron, Meghna Abraham and Maggie Maloney for input on Amnesty's early engagement with ESCR.

2 The working definition of social justice is 'the relative distribution of rights, opportunities and resources within a given society, and whether it deserves to be regarded as fair and just' (Cramme & Diamond 2009), as used by the editors of this volume in the introduction.

3 UN Committee on Economic, Social and Cultural Rights (CESCR) (1990) *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December, E/1991/23.



our view, the rights and obligations in the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international human rights treaties necessarily require states to carry out major political, social and economic changes in societies in order to fulfil their human rights duties. These would achieve significant elements of social justice, as described below.

Article 28 of the UDHR is particularly strong in this respect, stating that: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” The rights in the UDHR are so far-ranging that they require significant structural changes to national and international rules, if one takes this commitment seriously. Unfortunately, many do not.

Article 2.1 of the ICESCR, similarly, requires states to take all feasible steps, to the maximum of available resources, to realize ESCR and – and this part of it is often forgotten – to continuously improve living conditions. In many situations, this language is dismissed as being too vague or offering governments an opt-out, reflecting either cynicism on the part of progressive thinkers or a conservative approach which holds that governments alone determine what is feasible to implement their ICESCR commitment, rather than being held to an objective standard. Yet, a correct legal approach, based on proper treaty interpretation, reads the words of a treaty in light of its object and purpose, which is to realize ESCR for all. The flexible nature of Article 2.1 does not weaken the government’s obligation, but rather it makes clear that the government must do everything it takes to ensure ESCR. This includes ensuring that it mobilizes sufficient resources, uses them effectively for the realization of rights, and targets them effectively on the most disadvantaged.

However, much lies in interpretation. Many governments, legal experts and even people in human rights NGOs narrowly interpret human rights law to apply only those parts of it that explicitly set out precise and clear duties on government. However, law should be interpreted in good faith, in accordance with its object and purpose, and if this is done, then it is clear that human rights law is – or at least can be – a powerful tool for advancing social justice.

## **A radical shift but not far enough?**

Amnesty International has been working on ESCR for nearly fifteen years. During this time it has issued over two hundred major outputs on ESCR violations across more than forty countries in every region. It has carried out global and regional campaigns on housing, health, corporate accountability and legal enforcement of ESCR and worked in partnerships with communities in slums and informal settlements to prevent and challenge forced evictions and obtain better access to services. It has played a key role in helping a new dedicated international complaints mechanism – the Optional Protocol to the ICESCR – come into force and made vital contributions to standard setting in areas such as extra-territorial obligations and the rights to water and sanitation.

In sum, ESCR have become a core part of Amnesty’s work. However, it took nearly forty years before the organization decided in 2001 that it wanted to commit to this work, and inside and outside the movement, the extension of Amnesty’s mandate beyond civil and political rights remains problematic for some (although increasingly less so).<sup>4</sup> Prior to that, Amnesty would not address ESCR violations, although some of its work on civil and political rights contained in its mandate in effect addressed violations of both sets of rights, for example punitive house demolitions or state failure to take steps to prevent female genital mutilation.

In this respect, Amnesty’s late arrival to ESCR was part of the problem – many people continued to identify human rights with those civil and political rights that the organisation had traditionally worked on such as the prohibition of torture, and the rights to life (the death penalty), a fair trial and freedom of expression. This is despite the fact that for the vast majority of people on the planet, denials of ESCR are the human rights violations that most directly face them in their daily lives. Consequently, by the millennium it became increasingly

4 For example, Cohen, N. (2012), ‘Is Amnesty still fit to fight on anyone’s behalf’, *The Guardian*, 11 November. Available at: <http://www.theguardian.com/commentisfree/2012/nov/11/nick-cohen-is-amnesty-fit-fight>.

clear that Amnesty could no longer ignore ESCR and the need to give true meaning to the principle of indivisibility as affirmed in the Universal Declaration of Human Rights.

Amnesty began work on ESCR after 2001, documenting and responding to violations mainly concerning the rights to housing, food and health, as well as carrying out advocacy for the development of an Optional Protocol to the ICESCR.<sup>5</sup> Its Operational Plans for 2004-2010 aimed to promote ESCR as enforceable human rights, focusing on excluded or marginalized people who suffer systematic or grave abuses of these rights. However, it was not until 2009 that Amnesty devoted a major campaign (the 'Demand Dignity' campaign) to ESCR. The Campaign included work on four broad areas: slums; maternal health and sexual and reproductive rights; corporate accountability; and legal enforcement of rights.

Most work focused on state obligations to respect ESCR (particularly in the case of forced evictions) and to protect them (regulating corporate actors) rather than fulfil. That being said, a small but significant portion of Amnesty's ESCR output did grapple with issues of fulfilment of ESCR, in particular research that called on the state to provide maternal health services to women.<sup>6</sup> In Burkina Faso, our research pointed to the imposition of irregular charges for health services, creating a barrier to access to low-income households. One of Amnesty's first outputs focused on state interferences with the right to food in North Korea, but also called on the international community to provide food assistance.<sup>7</sup> Amnesty has often called on states to provide international assistance where required to fulfil ESCR, for example for slum upgrading and to assist states such as Lebanon to

provide basic services to refugees from Syria. Amnesty's work on slums focused not only on forced evictions and security of tenure, but also equal access to services, calling on states to provide services to a consistently marginalized group. This work addressed one of the largest social justice issues in developing countries: the gaps in access to goods and services (and by implication rights enjoyment) between those living in the formal and informal sectors.

Why has Amnesty done comparatively less work on fulfilment of rights, outside of the area of non-discrimination? It is certainly not as a result of any high-level strategic decision being taken to block work in this area: indeed, Amnesty's Strategic Plan for 2010-2016 stated that one of its change objectives at the local, national and international level was to secure: "Investment of human and financial resources in the rights to health, housing, decent livelihood and education."<sup>8</sup> It is important to note that decisions on the particular type of research projects that are carried out are distributed across the organization in that each programme or team normally decides on the type of issues it takes up, as long as it falls within the parameters of Amnesty's Strategic Plan. However, three factors appear to have led to a tendency across Amnesty to focus on respect and protect aspects of ESCR. These point to the work that Amnesty will need to do to meet its aspiration to increase focus on fulfilment of ESCR.

The first is the immediacy of such violations. For example, when a community is threatened by a forced eviction, their priority and that of human rights groups is to carry out 'firefighting' rather than work for longer-term realisation of rights. Furthermore, because Amnesty focused on the most marginalized groups, overt discrimination is and was often the greatest contributing factor to the denial of rights of that group. It was therefore logical to focus on discrimination first rather than a broad failure by the government to ensure adequate services for all.

<sup>5</sup> Amnesty International (2004) *An overview of work at the International Secretariat on Economic, Social and Cultural Rights (ESCR)*, 3 March (on file with authors).

<sup>6</sup> Amnesty International (2009) *Sierra Leone: Out of Reach: The cost of maternal health in Sierra Leone*, 22 September, Index Number: AFR 51/005/2009; Amnesty International (2009) *Burkina Faso: Giving life, risking death: Maternal mortality in Burkina Faso*, 31 December, Index Number: AFR 60/001/2009.

<sup>7</sup> Amnesty International (2004) *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)*, 17 January, Index Number: ASA 24/003/2004.

<sup>8</sup> Amnesty International (2010), *Amnesty International's Integrated Strategic Plan 2010 to 2016*, Index Number: POL/50/002/2010, C1.

The second is the difficulty of the investing of time and expertise required to document and advocate for changes with significant resource and policy implications, and to develop methodologies for doing so. In work on fulfilment of ESCR, it is insufficient to simply show a lack of exercise of the rights. It has to be shown that the state has clearly failed to take the necessary steps within its power. This requires at least an analysis of government policies and practise, which can take a significant amount of time, particularly where the researcher is not familiar with the particular sector. In contrast, work on 'respect and protect violations' drew on Amnesty's strengths in legal analysis and casework, and did not require detailed expertise in, for example, economic analysis or urban planning. In addition, given the concerns expressed by many that Amnesty was 'aping' or duplicating the work of development NGOs, it made sense to self-consciously focus on the type of research and campaigning that such organizations were not known for, in particular work to document harms affecting particular individuals.

The third is the work on respecting and protection of rights aligned with Amnesty's strengths in campaigning on cases where states and other actors were directly interfering with people's civil and political rights. Amnesty's civil and political rights work predominantly focuses on negative obligations rather than on positive obligations such as levels and quality of training of public security officials or the efficacy of justice systems. Thus, to build on Amnesty's 'comfort level' of campaigning and mobilization, it made sense to focus on negative obligations, particularly at the commencement of work on ESCR.

### **Speaking out on issues of resource distribution while retaining impartiality**

One concern often expressed in the internal debates within Amnesty was that the organization would end up becoming (or at least being seen to be) an organization identified with the leftist end of the political spectrum. Such a concern is only valid to the extent that it addresses the danger that the organization's approach departs from one that analyses and explains its recommendations in terms of human rights

law. To put it another way, Amnesty would certainly not shy away from calling for dissidents in undemocratic countries to be accorded, for example, their civil and political rights. However, it would be careful to demand only what is due to them from a human rights point of view – for example, if dissidents are detained on suspicion of spying for a foreign power, our call would be for due process rather than unconditional release (unless the suspicion was manifestly unfounded). Nevertheless, the impartiality concern weighed in favour of moving slowly in regard to issues of resource distribution outside clear-cut cases of discrimination to ensure that Amnesty can make a solid case for its recommendations.

In calling upon states to treat ESCR as legally enforceable rights and to remove barriers to remedy, one of the arguments Amnesty made was that public interest litigation can lead to changes in government policy that lead to significant improvements in the fulfilment of rights. Amnesty referred to litigation by other NGOs that has led to significant redistribution of resources within society. Its materials highlight two cases. First, right to food litigation in India, which, together with associated mobilization, led to an expansion and improvement in the provision of school meals in some parts of the country. In those states where the school meals programme was implemented, enrolment rates among girls in the first year increased by 10 per cent with an increased 350,000 girls a year entering school. Second, litigation in South Africa which led to the establishment and provision of drugs to prevent mother to child transmission of HIV (Amnesty International 2010: 13).<sup>9</sup>

Amnesty recognized that many legal systems have a range of barriers to effective remedy. One of these is that some legal systems do not adequately provide remedies that address systemic government failings. For example, Brazil's courts are often willing to require the state to provide

<sup>9</sup> The figures cited from India are drawn from Brinks & Gauri (2008): 327-8. These cases were also featured in a campaign digest: Amnesty International (2010) *Make Our Rights Law: Enforce Economic, Social and Cultural Rights*, Index Number: ACT 35/002/2010.

health care to individuals who have been denied it and who seek remedy before them, but, in contrast to South Africa, collective litigation to address systemic government failings to ensure the right to health has been far less successful.<sup>10</sup> In such cases, Amnesty therefore can, depending on capacity, carry out campaigning and advocacy both for changes to guarantee the substantive right at issue as well as for reforms to the justice system to remove barriers to remedy.

Thus, it is important to make clear that Amnesty had no principled objection to grappling with issues of resource allocation. During the authors' time in the ESCR team, it is difficult to recall any instance where it has held back from making any references to resources or allocation of power in society as a matter of principle. Rather, the factor holding back strong recommendations, for example in regard to the austerity crisis in parts of Europe, has been the lack of research projects to document the specific impact on human rights of government fiscal policies and budgetary allocations. Hence Amnesty has typically been able to make only general calls that reiterate government's commitments set out in international law.<sup>11</sup> That being said, Amnesty's Strategic Plans for 2016 onwards aim to devote more time to engaging with issues of resource distribution, as described below in under the heading 'Looking forward'.

It would be a mistake to assume that Amnesty's ESCR work began with a focus on low-hanging fruit. Although its work commenced on conceptually easier and more familiar approaches, Amnesty took on some incredibly challenging goals in terms of political and cultural change. It has concentrated its resources on some of the most disadvantaged and marginalized individuals and

communities. Amnesty's work has involved challenging, among other things: deep-seated racism against the Roma in Europe and Indigenous Peoples globally; denials of sexual and reproductive rights due to underlying and systemic gender discrimination and (in regard to contraception and access to abortion), deep-seated religious and cultural beliefs as well as disdain for the rights of people in informal settlements, often derided as 'illegal' people who should have stayed in their rural birthplace if they could not afford to secure legal housing. These are some of the most significant social justice challenges of our times.

However, bearing in mind the guiding principles for Amnesty's work – impartiality and focusing on legal standards rather than advancing a particular economic or political agenda – can we still point to achievements in Amnesty's work where it has shifted the social justice needle, and in so doing accommodated it and human rights?

### Have we shifted the needle?

As with all its activities, Amnesty is spending an increasing amount of resources assessing the impact of its ESCR work. The results indicate some significant results both in terms of securing better human rights protection and enjoyment whilst also indirectly advancing and promoting social justice.

By focusing on some of the most marginalized and disadvantaged people, we continue to set ourselves major challenges in advancing their human rights, let alone social justice. Those who are economically and socially excluded tend to be those who are also the most politically disenfranchised, finding it often impossible to participate in decision-making which affects their lives, and to seek justice for the wrongs perpetrated against them.

Yet Amnesty has made some progress. In housing, it has worked with communities in slums and informal settlements, in some cases for a number of years, helping to prevent forced evictions, build capacity and enhance their ability to hold state actors (especially at the local level) accountable. Successes include the establishment

10 Amnesty International (2010) *Make Our Rights Law: Enforce Economic, Social and Cultural Rights*, Index number: ACT 35/002/2010: 7.

11 One exception was a report by Amnesty International Spain, *Evicted Rights: Right to housing and mortgage evictions in Spain* (June 2015). The report pointed to the government's failure to explore the possibility of using the more than 3 million houses left empty in the private market and in the hands of the State's asset management company in order to meet housing needs.

and strengthening of community-based organizations among residents of Nairobi's informal settlements who carry out ongoing work to oppose forced evictions. In Slovenia, some Roma communities were able to secure access to publicly provided water services. One of the main planks of the work has involved advancing the right to a remedy not only to address wrongs for past violations and support accountability, but also to act as a deterrent against future abuses. Some of the key achievements have included securing unprecedented Race Equality Directive infringement proceedings against the Czech Republic and Slovakia for discrimination suffered by Roma school children, and the implementation of the *Sawhoyamaya v. Paraguay* Inter-American Court of Human Rights decision which restored to an Indigenous People their ancestral lands.<sup>12</sup>

It may be noted that most of these successes relate to 'traditional' areas of obligations to respect rights and non-discrimination. This reflects the fact that, as explained above, Amnesty's campaigning and sustained advocacy has hitherto mostly focused on these areas, rather than in regard to obligations to fulfil rights.

Conversely some of the main external obstacles we face are those that frequently confront us across all our work: the lack of political will or technical capacity by state actors at the national and local level, or both; vested political and economic interests; and cultural and societal conservatism. To comprehensively address these adverse forces would often require fundamental political and economic reform combined with a cultural shift in society. This is regardless of whether Amnesty was wedded to the international legal framework or not. Amnesty can and does call for such reforms on the basis of international human rights law, even if some of them may be unpopular in society. How one ensures such changes can happen is an ongoing discussion. One of the key factors in shifting the needle is

the fact that the organization, unlike many other NGOs, has deep roots in many societies around the world and can mobilize potentially millions of members worldwide.

However, the obstacles to change are also compounded by internal constraints. When Amnesty took up ESCR as a new issue, it added these rights to many other areas of ongoing work and therefore could not allocate extensive new resources. In addition, project cycles do not neatly conform to the long-term commitment required to delivering meaningful change, and there is insufficient technical expertise across the whole organization on the issue of ESCR.

These constraints might raise the question of whether Amnesty should seriously expand its focus to issues of fulfilment of rights, given the difficulties it has faced in regard to conceptually easier cases. To this loaded question, one response might be: how much more difficult could it get? It would seem that Amnesty has focused on conceptually simple but politically difficult challenges. For example it can be argued that demanding greater levels of state spending on Roma communities is no more politically challenging than demanding their rights to be educated within mainstream and non-segregated education.

### Looking forward... what will we do?

Amnesty's Strategic Plans for 2016 onwards aim to devote more attention to issues of resource distribution, in particular fulfilment of rights. One area is in regard to barriers to access to essential services, such as lack of affordable housing, lack of free access to essential sexual and reproductive health services including post-rape health care and emergency contraception, and the impact of privatization of public services.

Amnesty's future work on ESCR aims to examine the role of international financial institutions and the corporate sector in influencing state policy to the detriment of rights.<sup>13</sup>

<sup>12</sup> Inter-American Court of Human Rights (2006), *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, March 29. The latter occurred due to sustained lobbying by the Sawhoyamaya people with the assistance over a decade of a local organization Tierra Vida and Amnesty International.

<sup>13</sup> In the context of the preparatory negotiations for the UN Conference on Financing for Development, Amnesty contacted several key governments to request information on the extent to which their positions had been influenced

Amnesty will also extend its engagement on the issue of climate change, calling upon states, as it has in the past, to take all feasible steps to reduce the emissions of greenhouse gases and to ensure the protection of affected people, within and outside their borders. Climate change has a particularly negative impact on disadvantaged groups in societies, even though they are generally the least responsible for the problem.

When Amnesty engages with issues relating to the distribution of resources, what would be the basis for it to do so? We suggest a few situations where Amnesty could carry out such analysis to distinguish between real lack of resources and gaps in political will to realize rights. First, it could identify situations where a government has clearly failed to address the needs of disadvantaged groups in its plans and in practice, for example, failure to address palliative care for those suffering untreatable conditions.<sup>14</sup>

Second, it could expose a distribution of services that show a failure to prioritize the needs of disadvantaged groups, such as provision of a disproportionately high amount of public funds to wealthier areas within a city (Amnesty International is currently preparing to intervene as an *amicus curiae* in an ongoing court case on this issue). A variant of this form of analysis is to analyse pricing structures to examine whether they take affordability into account. For example, tariffs for water and sanitation are often regressive, providing subsidies only to those connected to water systems (i.e. excluding the poorest).

Third, it could assess whether a government has set out a plan to progressively realize ESCR, to cost them and to demonstrate an analysis of possible sources of funding.

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by lobbying of corporate actors. Amnesty will also examine situations in which funding by international financial institutions is coupled with conditions, or softer forms of pressure, requiring a state to privatize public services (without adequate human rights safeguards) and weaken regulation of natural resource exploitation.

14 See, for instance, Human Rights Watch (2009) *"Please, do not make us suffer any more...": Access to Pain Treatment as a Human Right*.

Fourth, Amnesty could ask the government to show that regressions or failure to provide minimum core obligations are unavoidable and that it has fully used and tried to mobilize available resources, in other words, relying on the CESCR's statement that in such circumstances, the state is held to have infringed its obligations under the ICESCR unless it can demonstrate that its resources were inadequate and that it had prioritized those resources available to it for essential levels of ESCR.<sup>15</sup> In this respect, Amnesty also plans to commence work on tax justice, addressing situations in which foreign corporations evade the payment of taxes, thus negatively impacting on the ability of the state to maximize revenue to pay for services for those in most need (Gaughran 2015). Such work would point to the need for governments to fix loopholes in their taxation rules that facilitate tax evasion and aggressive tax avoidance either domestically or in other countries.

Fifth, and linked to the fourth point, Amnesty could query the government's conduct by examining whether it has taken the steps that would be reasonable to take in light of the rights deficits in question. For example, has the government allocated public land for low-cost housing and where they exist, are such allocations respected? Has the government sought international assistance to meet these rights? Has the government taken adequate steps to curb tax evasion? Are mining concession offers and tenders for public services advertised in a transparent way?

Sixth, Amnesty could assess whether a country has adequately mobilized resources for public services by comparing it to its peers. For example, it could assess how much of a country's Gross Domestic Product is taxed and what is the per capita expenditure on public services in comparison to peer states. This type of analysis, routinely used by the Centre for Economic and Social Rights,<sup>16</sup> does not, on its own, prove a human rights violation, but does put the onus on a government to demonstrate why it allocates much less resources than its peer countries.

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15 CESCR (1990) *General Comment No. 3*, paras. 9 and 10.

16 See for example, Centre for Economic and Social Rights (2012), *Visualising Rights: Fact Sheet No. 12: Spain*: 6-7.

The above six analytical methods can, with some adaptation, also be applied to assess steps a state takes to fulfil rights extraterritorially, not only through international development assistance, but also in other domains such as trade.<sup>17</sup>

The methods discussed above would therefore focus on concrete, specific changes, justified by the realization of specific rights rather than ideology, and which in principle are consistent with both leftist and right (or at least centre-right) ends of the political spectrum. Nor would this work require Amnesty to necessarily advocate for the realization of one right over others in the abstract, or for the realization of ESCR at the expense of other public goods (e.g. protection of the environment, legitimate public security). Rather, it involves a call for redistribution of services and resources from privileged groups to disadvantaged groups or for change in the manner such services are provided in order to meet the needs of disadvantaged groups, in line with the obligations set in international human rights law.

In order to carry out this kind of work, Amnesty will need a couple of ingredients. One key one is the investment of time both by its policy experts as well as regional country teams to carry out detailed law and policy analysis, to be able to critically assess government reforms and – crucially – to take up a seat at the policy-making table if it is offered. One method to expand our capacity may be partnerships with specialized NGOs.<sup>18</sup>

17 These are set out in detail in Khalfan, A. (2013): 324-28.

18 A good example is the ground-breaking report by Centre for Economic and Social Rights (CESR) and Instituto Centroamericano de Estudios Fiscales (ICEFI) (2009) which examined Guatemala's failure to raise sufficient taxation to fund ESCR programmes. That report was the subject of a well-received presentation at Amnesty's International Secretariat by CESR's Executive Director, Ignacio Saiz (a former Director of Policy at Amnesty International). Amnesty and CESR have discussed the possibility of joint research in this domain in the future.

## Accepting that you cannot please everybody...

Some traditional constituencies may be disappointed at Amnesty's focus on social justice – this will be a function of the extent to which Amnesty's work on ESCR makes solid arguments based on law. This requires responsibility from all parts of the movement to ensure that campaigns clearly refer to human rights terms and analysis, and to use political terminology in a cautious manner. For example, it makes a difference whether we refer to people whose concrete rights are being violated rather than to 'the dispossessed'.

Can Amnesty satisfy a broader constituency of social justice activists? We consider two groups who may appreciate Amnesty's focus on the disadvantaged, but who may not consider Amnesty to be addressing their most deeply felt concerns.

The first are those focusing on broader forms of inequality within society – the distribution of wealth within society. Amnesty would oppose such forms of inequality only when it involves discrimination or where it is clear that such inequality leads to denial of ESCR, including when the state is failing to adequately fund public services and social welfare through taxation, and there is a failure to progressively increase the levels of enjoyment of ESCR.

In addition, Amnesty would generally focus on the most marginalized sectors of society, rather than addressing the distribution of resources between the upper and middle classes or issues of equity between countries. Perhaps the latter types of concern are best dealt with by other organizations than Amnesty.

The first would be those fundamentally opposed to greater involvement of the private sector in economic life. Amnesty, like the UN Committee on ESCR,<sup>19</sup> would not take a principled position against privatization, but would rather oppose it only in cases when independent regulatory processes were

19 UN Committee on Economic, Social and Cultural Rights (2003), *General Comment, The Right to Water (Art. 15, para 24, of the Covenant)*, 20 January, E/C.12/2002/11.

not in place, including mechanisms to ensure public control of terms of service and to guarantee access to information (thus precluding any denial of information to the public on the grounds of commercial confidentiality).

Human rights groups will also tend to react slower than other groups to new and emerging issues as they need to develop sufficient evidence to sustain their claims. However, as they become better at such work, they will be better placed to respond to new challenges, such as a newly announced austerity measure or a new taxation policy, on the basis of evidence in other situations.

The two constituencies mentioned above would generally find that Amnesty's objectives fall within part of their agenda, and this could lead to useful and significant collaboration. For example, groups opposing privatization of water services, such as the Council of Canadians, have together with Amnesty been at the forefront of advocacy for recognition of the right to water, even though Amnesty has not engaged with them in anti-privatization struggles.

## Conclusions

This essay has shown that Amnesty's existing work on ESCR has addressed social justice concerns to a significant degree, albeit on issues that relate to the respect and protection of rights and on non-discrimination. Amnesty's relatively limited engagement on broader issues of fulfilment of rights reflects an initial preference for ESCR work in areas where legal obligations of states were relatively clear-cut, the need to react to reversal of rights, such as forced evictions, and the relatively limited level of expertise and time required to carry out an analysis of relevant social and economic policies and practice. The essay has shown that the time is ripe for Amnesty to deepen its engagement in social justice issues, building on its existing work. However, Amnesty's work has focused and will generally focus on the most marginalized sectors of society, rather than address the distribution of resources between the upper and middle classes or issues of equity between countries. In that sense, Amnesty may be able to appeal to some but not all of the constituencies aiming at social justice.





## Human rights and social justice – a false dichotomy?

*Even a narrow view of human rights would necessarily overlap to at least some degree with social justice concerns that, erroneously, are too often viewed as only being related to economic and social rights.*

### Introduction

Should human rights NGOs work on social justice issues? Can human rights principles redress socioeconomic inequalities? Can human rights activists work with the global social justice movement?

The contributions to this volume of essays grapple with these and related questions, showing various degrees of enthusiasm, or none at all, for the proposition that human rights principles can advance social justice goals. At one end of the spectrum, there is the insistence that human rights advocates must tackle problems of global wealth inequalities, and at the other the warning that to do so will fatally weaken and compromise their core task of defending civil and political rights. In the middle ground, several contributors sketch out the prospects for using human rights advocacy to improve the lot of the poor and marginalized. Standing somewhat apart, Samuel Moyn makes an eloquent case that gross wealth inequalities do not offend human rights principles, provided that core, minimum needs are met and basic freedoms respected. This, he suggests, may spell waning interest in human rights as the downtrodden seek a more substantive justice in other forms of struggle.

Yet fundamentally, although many of the papers provide a stimulating read, one is left feeling that none grapple successfully with a core definitional problem. To contrast ‘human rights’ or ‘human rights advocacy’ or the ‘human

rights movement’, to ‘social justice’ or ‘social justice activism’ or the ‘global social justice movement’ is to presuppose these are definable categories; or at least definable in ways that garner broad agreement.

But they are not. Indeed, the range of perspectives taken on these terms by even the small group of authors in this volume is proof of that. For some, speaking of human rights necessarily includes all those rights found in the Universal Declaration of Human Rights (UDHR), thus including the right to an adequate standard of living, to education and health. To others, these economic and social rights (ESR) are not human rights, or if they are, they should not be the subjects of human rights advocacy (and that term itself is interpreted differently).

Similarly, for some of the authors, the discussion of social justice focuses on the fulfillment of basic human rights including ESR, and/or removing inequities in access to basic rights (Khalfan & Byrne). Others define social justice more broadly as “... the relative distribution of rights, opportunities and resources within a given society and whether it deserves to be regarded as fair and just” (Lettinga & Van Troost). And for others, it means a fundamental re-ordering and democratizing of the global order, to remove not just inequities but gross wealth inequalities (Moyn). Also in dispute is whether such a re-ordering is in fact a pre-condition for the full realization of ESR.

Simply put, it is hard to follow a debate when there is little clarity concerning the terms on which it is being waged. Indeed, several contributors focus on the question of the justiciability of ESR or the relative priority these rights deserve vis-à-vis civil and political rights. Their

assumption seems to be that the success of human rights activism in achieving social justice will depend almost entirely on ESR advocacy. But that, as we will see, is itself a debatable point.

This short article aims to make three points. First the content of human rights and of social justice is not fixed; opinions will vary. Therefore, the degree of overlap between these two concepts is bound to vary as well. Second, both civil and political and economic and social rights might be relevant in struggles for social justice. And third, human rights advocacy is as varied as the aims of those who

practice it – there is nothing inherently difficult about pursuing at least some social justice goals in the language of human rights.

### Overlapping concerns

Can human rights principles advance demands for social justice? The answer is deceptively simple. Demands for human rights and demands for social justice are distinct but overlapping. The degree to which they overlap will depend on the definitional limits given to both concepts; and this in turn will depend on who is defining these concepts. Consider the following table:

Human rights	Social justice demands
Right to political participation	<i>Real</i> democracy (“We are the 99%”); democratize and make accountable global financial institutions
Right to information	Restrict corporate power; eliminate corruption; tax justice
Equality and non-discrimination guarantees	Women, caste, and class emancipation; abolish anti-poor laws; land redistribution
Freedom of association and assembly	Democratize the workplace
Freedom of expression	Break-up media monopolies
Right to privacy, and property	No seed monopolies; protect local bio-heritage against outside ownership
Right to food, water and an adequate standard of living	Living wage; no water privatization; climate justice
Right to education and health	Abolish school and tuition fees; equal access to medications
Right to self-determination	No foreign ownership of farmland; restrict foreign TNCs
Indigenous rights	Stop dams; indigenous veto on development
Right to peace	End militarism and the arms race

The table lists a set of human rights in the left hand column, each of which finds support in the UDHR or other UN human rights standards. In the right-hand column there is a set of demands that are commonly put forward by those said to be pursuing social justice or “global social justice”.<sup>1</sup> The alignment of the social justice demand to the corresponding human right is simply meant to indicate that the human right in question provides *some* (even if limited) degree of support to the social justice demand. Further, social justice movements making such demands have sometimes cited that particular right in support.

Thus, for those who would include in the idea of social justice that there must be an end to corporate and elite control of democratic institutions, the right to political participation in the UDHR (and related rights to freedom of association, to information and to equality) provides a principled basis for such a demand (and the extent to which the right supports the demand in full will depend on a variety of factors). Similarly, equality and non-discrimination guarantees in the UDHR and other standards provide a principled basis for many social justice demands regarding the emancipation of women, downtrodden castes or for ending discrimination against the poor *qua* poor.

The rights listed in the table begin at the top with classic civil and political rights but as one moves down include ESR and then more controversial collective and solidarity rights. But, to be clear, each of the rights listed is supported in one or more UN standards. It follows that if one agrees that all of the rights listed are properly considered human rights – and are properly the subject of human rights advocacy – then one will see a fair degree of overlap between the human rights canon and social justice demands. If, on the other hand, one would consider only the first five or six rights as properly within the scope of human rights advocacy, then there will be much less overlap between the human rights canon and social justice demands. But, and this cannot be stressed enough, even

for those who choose to take a very limited approach to defining the content of human rights (for example, Aryeh Neier's contribution to this volume), *there will still be some overlap with social justice demands*.

This brings us to the issue of the indivisible nature of rights. The demands formulated by oppressed peoples may not divide neatly into cold war categories of rights. Persistent and severe malnutrition among a marginalized ethnic group may be conceived of as a right to life issue or an issue of equality and non-discrimination; it might also be framed as a right to food or right to health issue. Most likely, it touches on all these rights. Thus, the relative strengths and weaknesses of ESR, or ESR advocacy efforts, tells us little about whether human rights principles and advocacy can support social justice claims.

Consider what might be achieved for ‘social justice’ if we only sought to apply the rights in the International Covenant on Civil and Political Rights (ICCPR). It's *explicit* promises of equality, non-discrimination, protection of minority rights, and freedom of association (including for workers), alongside its *implicit* rights to information, to equal access to government services and to full participation in political life – if fully respected and protected – provide a useful set of tools for any movement fighting for greater socioeconomic equality, or challenging economic and social marginalization.

This would result even before one applied a more progressive reading of the ICCPR; for example, one that would interpret its right to life and security of the person guarantees as extending to a concern for government policies that failed to avert famine or persistent hunger, or to exercise due diligence to tackle preventable disease, or to prevent dangerously unhealthy work environments. Indeed, a progressive reading of the ICCPR's prohibitions on servitude might extend to prohibiting grossly underpaid work or the exploitation of migrant and temporary labour. Similarly, what might be achieved for global social justice if key ICCPR rights were held to create extra-territorial obligations on states, whereby the impact of their foreign trade, aid, security, and investment policies on the enjoyment of these

1 Many of these claims can be found in Figure 1 “Grievances and demands driving world protests, 2006-2013”, in the paper by Sara Burke in this volume.

rights in other countries was assessed? Controversial, to be sure, yet this is an interpretation that is already being advanced in some instances by the UN's expert bodies.

In short, there is necessarily some overlap between the content of human rights and that of social justice, and the degree of overlap will very much depend on the relative breadth one gives to these terms. The authors in this volume disagree about the relative priority or weight given to ESR, or the usefulness of this category of rights in tackling social justice issues. Certainly, the fact that ESR as guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are subject to temporal and resource limitations (they can be achieved *progressively* and within the bounds of *available resources*) poses unique difficulties. So too the question of determining how much resources ought to be spent to fulfill these rights – not always easy to answer without appearing to abandon principle for preference. But the fact is that these rights are being used by thousands of advocates and in diverse settings (well beyond the one or two 'exceptional' cases cited by Aryeh Neier in this volume), and not just in courts. In any event, as the argument above makes clear, the ESR issue is not determinative on the question before us – since many civil and political rights principles might be used to support social justice demands.

### Shared activism

For some of the authors, the fact that there might be some overlap in content between social justice and human rights (however broadly or narrowly defined) is not the real problem; rather, as they see it the problem is in *adapting* human rights methodology or forms of advocacy to social justice demands. Some papers argue it cannot or should not be done, others that there are risks in doing so, and still others that human rights advocacy should adapt to be successful in pursuing social justice goals.

But again, underlying these arguments is the assumption that *there is already* a specific human rights methodology or form of advocacy. In fact, a wide variety of techniques are used. Several of the authors accept uncritically, for example, that 'traditional' human rights advocacy is grounded in

legal standards and that it privileges advancing reform through legal or at least formal institutions. Chong for example argues that "... [t]he major international human rights organizations, predominantly staffed by legal experts, have often hoped that the technical language of the law and the routinized processes of judicial systems would allow them to advance human rights in a non-ideological manner". Although he's correct that major INGOs aim to be non-partisan, he overstates the role of the law and 'legal experts' in these organizations. Amnesty International (AI), for example, has relatively few lawyers on staff and it would be a mistake to consider that their opinions alone shape campaigning or advocacy. All the complaints one might imagine against campaigns based on the "technical language of the law" are very much a part of the internal debate within large INGOs like Amnesty.

Similarly, Lettinga and Van Troost argue that the tendency of AI in recent years to make broad, sweeping critiques of an unjust global order suggests that "... [Amnesty International's] understanding of human rights seems to be changing from a legal to a moral one, interchangeable with broad notions of justice, dignity and equality and more or less detached from the international legal standards embedded in treaties, laws, and declarations".

While it's a fair point as regards AI's changing discourse, they might more correctly have said the organization is changing *back* to articulating a moral understanding of rights. The embedding of AI's demands in international legal standards was far from central to its work in the organization's formative years. Although basing its work in the UDHR, in its first decade Amnesty saw itself as making a moral claim – an appeal to conscience. Where international treaties were supportive they would be used, but AI would not be constrained by them. Indeed, when AI adopted its campaign against the death penalty, the punishment was expressly permitted in the ICCPR and no international treaty prohibited it. The organization only set up a legal office halfway into its second decade.

But crucially, as regards the supposed continuity of international legal standards and the positions taken by

human rights NGOs, many of these groups take policy and advocacy positions that are only weakly supported in international law (though they might claim otherwise). For example, demanding that no forms of conditional amnesties can be given to war criminals, even if it means a failure to do so will obstruct a peace negotiation; that sex work be legalized; that hate speech be permitted; or that women may wear the burkha in public spaces in deeply secular countries. The notion that international law provides clear answers in the area of civil and political rights, thus making advocacy in this area less ‘political’, and less indeterminate, in itself betrays an ideological positioning; one that privileges the law and those who interpret it.

In this context, Burke’s argument that “...[d]etermining whether civil and political rights have been violated is a relatively unambiguous process compared to making that determination with regard to economic, social and cultural rights”, is illustrative. Clearly misinformed (consider only the difficulty of judging the limits of free expression, or religious practice), it in any case speaks only to a certain style of advocacy, namely that practiced by groups like Amnesty and Human Rights Watch who routinely make authoritative pronouncements on what international standards do and do not protect. But this is only *one* form of human rights advocacy; there are a myriad of others, some of which use the law very sparingly, or not at all.

Perhaps to illustrate the dangers of assuming a certain form for human rights advocacy in contrast to social justice activism, consider two of the great, defining struggles for justice of past decades: the anti-apartheid movement and the civil rights campaign in the US.

Was the campaign against apartheid in South Africa a human rights struggle, a battle for social justice or both? Bear in mind that some of the grievances which led to key turning points in that struggle were matters of economic and social justice – the Sharpeville Massacre in 1960, over pass laws restricting residence and employment, and the Soweto Uprising in 1976, protesting controls on education. Similarly, the ‘civil rights’ struggle in the US – is this a human rights campaign or a fight for social justice or both? Human rights

principles – and litigation – were certainly at the core of the campaign, yet at the same time many of the rights African-Americans were fighting for were matters of socioeconomic justice (desegregated schools, improved housing, fair employment standards, equal access to and use of public services, etc). It would be odd if the human rights aspect of either campaign were limited to being a description of litigation in the courts, or the publication of UN reports. Why wouldn’t human rights activism include civil disobedience, strikes, sanctions, disinvestment, political organizing and so many other tactics used in these struggles?

Burke argues that orthodox economics, including the growth imperative, private sector-driven development, and blindness to the “social outcomes of increased financialization” is “unchallenged in the dominant discourse on human rights”. But again, this ignores the actual work of many self-described human rights groups who work on precisely these issues. Moreover, although “dominant” is itself ambiguous, one would hardly call the UN Human Rights Council marginal. Yet it has appointed rapporteurs on all key economic and social rights, many of whom have written prominent reports, widely debated, on the impact of privatization, austerity, or market fundamentalism on the effort to fulfill ESR. Moreover, the Council has appointed experts to study and report on “the promotion of a democratic and equitable international order”; on “extreme poverty and human rights”; on the “effects of foreign debt on the fulfilment of human rights”; “on human rights and international solidarity” and others. The issue of subjecting transnational corporations to greater human rights scrutiny has been prominent on the Council’s agenda for over a decade. The Council also convened in special, emergency session to debate the impact of the 2008-09 financial crisis on human rights. Whether any of this activity has much impact is a fair question, but it’s not as if human rights actors – even mainstream ones – are ignoring the perverse effects of market fundamentalism.

It is true, to a Western audience at least, a dominant – or more visible – form of human rights advocacy is focused on invoking international legal standards and seeking legal reform and accountability. Similarly, where those

standards prescribe a clear course of action, simply demanding that government's follow it does insulate (at least somewhat) that advocacy from the charge of political bias or preference. But as many of the articles point out, many ESR claims can be advanced strictly within the framework of obligations established in international law – there should be no debate on the issue of free, universally accessible primary education. And, as argued above, some positions on civil and political rights are weakly supported in international law. If serious, the claim that a move away from law will 'politicize' rights claims would need to account for the fact that many organizations have for decades championed positions that are not firmly grounded in international law, but rather amount to very progressive interpretations of that law, or in fact are claims that *new* legal standards are needed. In other words, the supposed tension between law and politics is neither unique to ESR, nor is it a particular problem for tackling many social justice questions. For example, even human rights NGOs who feel most comfortable grounding all their work in international law, and using traditional advocacy methods, could engage meaningfully in campaigns for tax justice, or indigenous land rights.

### Great expectations

In concluding, one might say that those debating human rights and social justice tend to expect either too much or too little of human rights principles. It borders on delusional to imagine a complaints mechanism to the UN's Covenant on Economic and Social Rights, or even greater ESR litigation in national courts, will do much to disturb the existing and grossly inequitable global economic order. As several authors, including Burke, Chong, and Khalfan and Byrne point out, there are clear limits to what human rights principles will support. They will not easily be used to endorse one form of economic system over another, or to rule out absolutely some policy choices like privatization or permitting foreign investment. As the table above shows, social justice demands tend to be broader than the more narrow human rights principles. Yet, at the same time, it is clearly the case that these principles can and are being invoked to aid in social justice struggles, and increasingly so in debates about the inequalities inherent in the global economic order.

This apparent confusion about what human rights can deliver is evident in Moyn's article. He playfully posits "Croesus's world" where a benevolent overlord ensures basic freedoms are respected and basic needs are met. Although in this world there are glaring inequalities, a "floor of protection" is set. According to Moyn, "... we could live in a situation of absolute hierarchy like Croesus's world, with human rights norms as they have been canonically formulated perfectly respected". He wants to make the point that human rights norms on their own do not fundamentally challenge glaring wealth inequalities. On that point, he's right – but who imagined they would? Even so, this hardly makes them irrelevant. For as Moyn appears to overlook, the UDHR and many subsequent UN standards promise that "... the will of the people shall be the basis of the authority of government"; and that this should be expressed through free, fair, and periodic elections grounded in equal suffrage. The benevolent dictatorship we are asked to imagine is itself, *prima facie*, inconsistent with even a narrow understanding of human rights. If Croesus presides over a grossly unequal world, and all can equally have a say in electing him, it's likely to be a short reign.

Finally, pondering the relationship of social justice to human rights calls to mind the remarks of the great American satirist, HL Mencken, who when asked if he believed in baptism replied, "Believe in it? I've seen it done!" There can be little doubt that the global human rights framework as it exists today – its international norms and institutions – is ill-equipped *on its own* to challenge, never mind reverse, growing global wealth inequalities. Nor will human rights litigation halt climate change. Yet insisting on the inadequacy of human rights tools, or on the inappropriateness of applying them to these issues, seems pointless in the face of the fact that so many people do place an emphasis on human rights in campaigns for social justice. Given the scale of the misery they confront, who are we to say that they've chosen the wrong language in which to do so?

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Worldwide socio-economic inequalities are mounting. While in absolute terms poverty rates are slowly going down, differences in income and wealth are growing. Deprived groups and protest movements mobilize to demand social justice. What do human rights have to offer them? This volume in Strategic Studies' Changing Perspectives on Human Rights series focuses on conceptual and strategic differences and similarities between social justice and human rights.

The twelve essays discuss different views on questions such as: Can human rights bring social justice? Can the human rights system speak out on political and economic structures that are seen as causing inequality? Should human rights organizations engage with political resource decisions? Would they risk being viewed as partisan if they engage with issues of redistribution or does their impartiality betray the poor and marginalized if they remain silent on system failures? Twelve essays provide diverging perspectives on the potential and limits of human rights for social justice and trade-offs in the strategic decisions of human rights NGOs.

With contributions from Eduardo Arenas Catalán, Widney Brown, Sara Burke, Iain Byrne, Koldo Casla, Dan Chong, Ashfaq Khalfan, Rolf Künemann, Douthett Lettinga, Jacob Mchangama, Samuel Moyn, Aryeh Neier, David Petrasek and Lars van Troost.

